COMMONWEALTH OF VIRGINIA
STATE AIR POLLUTION CONTROL BOARD
SUMMARY AND ANALYSIS OF PUBLIC TESTIMONY FOR
REGULATION REVISION E03
CONCERNING

MAJOR NEW SOURCE REVIEW REFORM
(9 VAC 5 CHAPTERS 50 AND 80)

INTRODUCTION

At the March 2005 meeting, the board authorized the department to promulgate for public comment a proposed regulation revision concerning major new source review (NSR) reform.

A public hearing was advertised accordingly and held in Glen Allen, Virginia on August 17, 2005 and the public comment period closed on September 12, 2005. The proposed regulation amendments subject to the hearing are summarized below followed by a summary of the public participation process and an analysis of the public testimony, along with the basis for the decision of the board.

SUMMARY OF PROPOSED AMENDMENTS

The proposed regulation amendments concerned provisions covering major new source review reform. A summary of the amendments follows.

The following amendments apply to Articles 8 (PSD areas) and 9 (nonattainment areas):

1. Provisions for electric utility steam generating units (EUSGUs) have been added in order for the baseline state regulations to be consistent with the baseline federal regulations.

2. Requirements for determining whether physical changes made to existing emissions units trigger major NSR requirements have been revised. Sources establishing their baseline actual emissions may now use any consecutive 24-month period during the five-year period prior to the change to determine the baseline actual emissions.

3. The method for determining if a physical or operational change will result in an emissions increase has been revised. The previous "actual-to-potential" and "actual-to-representative-actual-annual" emissions applicability tests for existing emissions units have been replaced with an "actual-to-projected-actual" applicability test.

4. Provisions for plantwide applicability limits (PALs) have been added. A PAL is a voluntary option that allows a source to manage emissions without triggering major new source review. The PAL program is based on plantwide actual emissions. If the emissions are maintained below a plantwide actual emissions cap, then the facility may

avoid major NSR permitting process when it makes alterations to the facility or individual emissions units.

5. Provisions for pollution control projects (PCPs) have been added. A PCP is an activity, set of work practices, or project at an existing emissions unit that reduces air pollution. Obtaining a PCP exclusion relieves the PCP from major NSR review.

6. Provisions for Clean Units have been added. An emissions unit qualifies as a Clean Unit, and qualifies to use the Clean Unit control technology applicability test, if it has gone through major NSR permitting review and is complying with a BACT or LAER determination that has been subject to public participation. When a source undergoes NSR review and installs a BACT or LAER technology that has undergone public comment, it may make changes to a Clean Unit without triggering an additional major NSR review.

The following amendments are limited to specific articles:

7. Article 8 has been revised in order to be consistent with other NSR regulations. This consists of (i) removing federal enforceability of certain provisions that should be enforceable by the state (toxics and odor) in order to prevent state-only terms and conditions from being designated as federally enforceable in a permit; (ii) deleting provisions covered elsewhere regarding circumvention, and reactivation and permanent shutdown; and (iii) adding provisions regarding changes to permits, administrative permit amendments, minor permit amendments, significant amendment procedures, and reopening for cause.

8. Article 6 (the minor NSR regulation) has been revised to remove provisions for PCPs that would be covered by the changes to the major NSR regulations.

9. Article 4 of 9 VAC 5 Chapter 50, which contains general requirements for new and modified stationary sources, has been revised to be consistent with the control technology provisions of Articles 8 and 9.

SUMMARY OF PUBLIC PARTICIPATION PROCESS

A public hearing was held in Glen Allen, Virginia on August 17, 2005. Six persons attended the hearing, with three of those offering testimony; and seven additional written comments were received during the public comment period. As required by law, notice of this hearing was given to the public on or about July 11, 2005 in the Virginia Register and in seven major newspapers (one in each Air Quality Control Region) throughout the Commonwealth. In addition, personal notice of this hearing and the opportunity to comment was given by mail to those persons on the department's list to receive notices of proposed regulation revisions. A list of hearing attendees and the complete text or an account of each person's testimony is included in the hearing report which is on file at the department.

ANALYSIS OF TESTIMONY

Below is a summary of each person's testimony and the accompanying analysis. Included is a brief statement of the subject, the identification of the commenter, the text of the comment and the board's response (analysis and action taken). Each issue is discussed in light of all of the comments received that affect that issue. The board has reviewed the comments and developed a specific response based on its evaluation of the issue raised. The board's action is based on consideration of the overall goals and objectives of the air quality program and the intended purpose of the regulation.

1. **SUBJECT:** Determining baseline emissions and emissions increases, PALs.

COMMENTER: U.S. Environmental Protection Agency (EPA)

TEXT: In the EPA rule, the lookback period for determining past actual emissions is specified as any consecutive 24 months in the previous 10 years. The Virginia proposal uses any consecutive 24 months in the previous 5 years. In the EPA regulation, the period used for establishing each pollutant baseline can be different for each pollutant. The Virginia proposal requires that it be the same for all pollutants except where extenuating circumstances would allow use of different baseline periods. The EPA rule establishes PAL duration as 10 years; the Virginia proposal contains a 5-year duration. The EPA rule allows a different baseline period for each PAL pollutant; the Virginia proposal requires the same baseline period for all PAL pollutants unless extenuating circumstances would require use of different baseline periods. The Virginia rule also proposes additional recordkeeping requirements that go beyond the federal rules.

The EPA regulation does not specify consequences where the owner determines there is a reasonable possibility that a project that is not part of a major modification may result in a significant emissions increase and does not obtain a permit. The Virginia proposal specifies how the state will act should the owner fail to make an accurate determination. The EPA regulation requires owners to develop and maintain information to support their determination that a given project is not a part of a major modification that may result in a significant emissions increase and only requires advance notification from electric steam generating facilities. The Virginia proposal requires 30 day advance notification of the availability of the information prior to beginning actual construction of the project for all sources.

The state will need to explain or offer information to EPA describing how this proposal should be considered equivalent to the federal regulations.

To be consistent in application to all sources however, EPA recommends that the following statement be made for **all** sources with respect to advance notification: “Nothing in this subdivision shall be construed to require the owner of such a unit to obtain any determination from the board before beginning actual construction.”

RESPONSE: EPA is requiring states to make significant changes to their major new

source review (NSR) programs that will provide the regulated community with a significant economic benefit due to "the reduction in administrative costs from streamlining of the permit process and the decreased opportunity cost from delayed changes." EPA has declared that the improvements to the major NSR program will be "environmentally beneficial compared to the current program." Major NSR programs are one of the key tools state used to manage the growth of new emissions, particularly in nonattainment areas.

However, EPA also admits that it "cannot quantify with specificity the emissions changes for a given pollutant or pollutants, if any, that result from the NSR rule changes now being adopted, nor can we reliably determine the anticipated locations of any emissions changes." The reasons for this uncertainty are stated to be the voluntary nature of the improvements, insufficiency of available data for modified units to estimate the benefits of the improvements as it relates to modified units, difficulty of linking permits to environmental results, and the absence of detailed records.

Given the qualitative nature of EPA's analysis and, thus, the uncertainty of this environmental benefit, it is not unreasonable to conclude that this environmental benefit may not materialize and that states will risk their air quality if they proceed to implement the reforms wholesale. Therefore, it is not unreasonable for states to be conservative and take a cautious approach to implementation, especially since the ultimate responsibility for meeting the air quality goals of the federal Clean Air Act rests with the states.

Below is an assessment of (i) the supplemental analysis that forms the basis for EPA's reform rule, (ii) Virginia's air quality needs with respect to the major NSR programs and (iii) the demonstration that EPA requires of states that choose to differ from the EPA rule. This is followed by the responses to comments related to Virginia's primary alternative approaches to the federal rule.

EPA Supplemental Analysis Assessment

To provide the basis for its major new source review reform regulations, EPA has promulgated a supporting document: "Supplemental Analysis of the Environmental Impact of the 2002 Final NSR Improvement Rules," ("Supplemental Analysis") [http://www.epa.gov/nsr/documents/nsr-analysis.pdf]. In this document, EPA states, "These reforms are aimed at providing much needed flexibility and regulatory certainty, and at removing barriers and creating incentives for sources to improve environmental performance through emissions reductions, pollution prevention, and improved energy efficiency." EPA also states "collectively, the five NSR Improvements that the Agency is finalizing will be environmentally beneficial compared to the current program, and will improve air quality by reducing emissions from industrial facilities."

EPA goes on to state that:

> improvements in air quality will result in health and welfare benefits from reduced concentrations of pollutants regulated by the NSR program, primarily criteria pollutants. These benefits are relatively small compared to those of other air regulatory programs, but will result in a net environmental benefit compared to the current rule. For example, EPA's analysis of PALs finds that there are

> likely to be reductions in emissions of Volatile Organic Compounds (VOC) in the range of 3,400 to 17,000 tons per year from just three industrial categories. The agency believes that, overall, the use of PALs will actually reduce emissions by a greater amount, once additional categories and pollutants are considered. The analysis also finds that the Clean Unit Test and the exclusion for Pollution Control Projects will result in emissions reductions compared to the current program. Similarly, the analysis finds that the actual-to-projected-actual test is likely to be environmentally beneficial, but only to a small extent. The final reform, the change in the emissions baseline, will affect a very small number of facilities. Although it may allow for a small number of sources to avoid permitting because of the availability of a higher baseline, a small number of sources will also now be subject to a more stringent baseline. Thus, the analysis concludes that the overall consequences of the baseline change will be negligible.

EPA acknowledges that fewer changes will trigger NSR under the 2002 rule than under the 1980 rule. Although EPA recognized that it lacked sufficient data to determine whether the 10-year lookback period would result in an overall increase or decrease in emissions, it concluded that "in either case, the magnitude of the change is likely to be very small."

However, as discussed above, EPA has also stated that that it "cannot quantify with specificity the emissions changes for a given pollutant or pollutants, if any, that result from the NSR rule changes now being adopted, nor can [it] reliably determine the anticipated locations of any emissions changes." EPA has acknowledged that its impact analysis is based on incomplete data and has been unable to reasonably quantify the 2002 rule's impact on public health. A General Accounting Office (GAO) Report to Congress stated that the economic and environmental impacts of the 2002 rule are "uncertain because of limited data and difficulty in determining how industrial companies will respond to the rule." GAO noted, for example, that because EPA lacked comprehensive data, it relied on industry anecdotes in concluding that NSR discourages sources from making changes that improve operating efficiency. GAO further pointed out that EPA's projection that these efficient changes will decrease actual emissions is based on the unverified assumption that sources will not increase their production levels after implementing the changes. Nevertheless, GAO did not conclude that the 2002 rule lacked adequate evidentiary support. Rather, GAO recommended that EPA "monitor the emissions impacts of the rule" and "use the monitoring results to determine whether the rule has created adverse effects that the agency needs to address."

In June 2005, the U.S. District Court of Appeals for the D.C. Circuit Court vacated the Clean Unit and PCP provisions while upholding the remaining NSR reform provisions. In light of the court's rejection of the Clean Unit and PCP provisions (on which EPA relied in concluding that the five NSR reform provisions will improve air quality), the court recognized that there is a heightened need for EPA to have sufficient data to confirm that the remaining portions of the reform rule do not result in increased emissions that harm air quality and public health.

The court concluded that although the data on which it relied was inadequate, EPA's agency decision to promulgate the NSR reforms was not arbitrary and capricious. The court, therefore, upheld the remaining NSR reform provisions: even though the basis for the provisions was faulty, the agency was not held liable for choosing to promulgate those provisions. However, the concern at the state level--where the rules must be implemented--

is not whether EPA acted in a legally proper way or not, but rather whether the information on which EPA's rules are based is adequate.

One may conclude from this analysis that these reforms should be implemented because there will likely be an environmental benefit due to some of the improvements and a small or negligible impact for others. One may also conclude that since there is no adverse environmental impact due to moving from the current major NSR program to the reform program, it is not prudent to retain the current program or implement a compromise program. However, given the qualitative nature of EPA's analysis and, thus, the uncertainty of this environmental benefit, it is not unreasonable to conclude that the environmental benefit may not materialize and that states will risk their air quality if they proceed to implement the reforms wholesale. Therefore, it is not unreasonable for states to take a cautious approach to implementation, especially since the ultimate responsibility for meeting the air quality goals of the federal Clean Air Act rests with states.

Virginia's Air Quality and Environmental Needs

Virginia has numerous reasons for taking a somewhat conservative approach to revising its new source review program. These reasons cover a variety of issues, from public health and air quality, to administrative and operational concerns, and are discussed in detail below.

While many aspects of the EPA rule will likely result in some air quality benefit when applied in Virginia, the Commonwealth's overall air quality situation can benefit from a certain changes to the EPA requirements. § 10.1-1308 of the Code of Virginia states, "The regulations shall not promote or encourage any substantial degradation of present air quality in any air basin or region which has an air quality superior to that stipulated in the regulations." In other words, no regulation may contribute to the deterioration of air quality. Given the uncertainty of specific impacts that implementing the federal rules will have on the areas of the state that are attaining the national standards, it is believed that a certain limitations on some aspects of the federal rules may help ensure that this state-specific need is met.

In addition to ensuring that areas of the state that meet the national standards continue to do so, the Commonwealth is also obligated to actively improve air quality. Currently, approximately one half of the Commonwealth's citizens live in areas that do not attain the national standards. Visibility problems have been identified in Virginia's Class I (national park) areas. Additionally, nitrogen deposition from airborne emissions is contributing to serious water quality problems in Chesapeake Bay. In this larger context, it is clear that the state needs to take additional steps beyond the immediate legal requirements for nonattainment and PSD areas if larger, statewide issues of air quality are to be addressed. Again, given the uncertainty surrounding the specific impacts of the federal rule, the state rule is exercising its responsibility to consider a somewhat more closely scrutinized process for implementing the basic elements of NSR reform.

Virginia has a legal obligation to incorporate the federal regulations in a manner that will result in equal or better environmental benefit. In order to balance the need to meet

Virginia's specific air quality needs with the need to improve permitting certainty and flexibility, a number of revisions to the federal rules have been made.

Equivalency Demonstration

To be SIP-approvable, state programs must include the EPA changes as minimum program elements, and must assure that any program changes are consistently accounted for in other SIP planning measures. Revisions to state permitting programs for both nonattainment and attainment areas are due no later than January 2, 2006.

In the preamble (67 FR 80240, December 31, 2002) to the final federal NSR regulation, EPA addresses the issue of differences from the federal base program and states:

> . . . State and local jurisdictions have significant freedom to customize their NSR programs. Ever since our current NSR regulations were adopted in 1980, we have taken the position that States may meet the requirements of part 51 "with different but equivalent regulations." 45 FR 52676. Several States have, indeed, implemented programs that work every bit as well as our own base programs, yet depart substantially from the basic framework established in our rules . . . we have not implemented our base programs with a one-size-fits-all mentality and certainly do not have the goal of "preempting" State creativity or innovation.
>
> Perhaps the biggest potential disadvantages to implementing the new applicability provisions as part of our base programs are the time and effort required to revise existing State programs and to have the revised programs approved as part of the SIP. For States that choose to adopt all of the new applicability provisions, we expect that the SIP approval process will be expeditious. Of course, the review and approval process will be more complicated for States that choose to adopt a program that differs from our base programs. For example, if a State decides it does not want to implement any of the new applicability provisions, that State will need to show that its existing program is at least as stringent as our revised base program. It would be impossible for us to plan ahead for all of the possible variations that States might ultimately elect to pursue. We will, however, reach out to relevant stakeholders immediately after publication of these rules and try to develop streamlined methods for addressing common questions that may arise during the SIP approval process.

In the text of the final federal NSR regulations (40 CFR 51.165 and 40 CFR 51.166), EPA provides additional specifics on this matter:

> With regard to those provisions relating to definitions; relating to the determinations of significant emissions increases and significant net emissions; and relating to circumstances where there is a reasonable possibility that a project that is not a part of a major modification may result in a significant emissions increase, EPA indicates that "deviations from these provisions will be approved only if the State specifically demonstrates that the submitted provisions are more stringent than or at least as stringent in all respects as the corresponding" federal provisions.

States must now address EPA's expectation, with no further specific or formal guidance, that alternatives to the federal program be demonstrated to be equivalent to or more stringent than the federal requirements. This demonstration will be made by Virginia when the regulations are submitted to EPA as a State Implementation Plan (SIP) revision.

Virginia Improvements to the Federal Rule

The EPA rule on which the state rule is based allows states some discretion in how the

program is implemented. As long as the base elements of the program are included, states are allowed to tailor the federal rules to meet state needs. EPA has stated that specific enforcement of the rules is to be delineated by the states. Generally, as long as the state rule does not impede a source's ability to use the basic elements of the NSR program, EPA considers the state regulation to be equally as protective as the federal rule. The baseline elements of the EPA program are being included in the Virginia proposed regulation; however, the state is also exercising its discretion to make modifications to the baseline in order to meet state needs.

The air quality situation in Virginia requires additional controls in order to protect public health and welfare, and a strong NSR program is one tool by which this can be accomplished. However, the assertion that the EPA NSR reforms present a "rollback" of protections is inconclusive. The new rules encourage the application of air pollution control equipment and work practices. While changes to a source may no longer be scrutinized through the traditional approach of a permitting analysis for every facility change, this will be outweighed by a shift in focus to activities with more significant impacts to the environment. Limited resources will be diverted to projects with a potentially significant impact to the environment rather than on projects with positive or neutral effects to the environment. The availability of additional recordkeeping that sources will have to conduct in order to justify projects that are exempt from major source NSR will be another positive result from the new NSR rules. Generally, the baseline federal reforms augmented with revisions designed to meet state-specific needs represents the best approach for implementing the NSR program in Virginia.

The Virginia regulation amendments are more restrictive that the applicable legal requirements in the sense that Virginia's changes may impose some relatively minor restrictions to the baseline EPA provisions. For example, the Virginia proposal limits the timeframes from which a source may establish its period of representative operation in order to assure adequate monitoring for compliance and enforcement purposes. Virginia's changes also require some additional recordkeeping and reporting, which may represent an additional upfront burden to sources that may be dissipated later on as the program transpires, and which also provide additional compliance and enforcement support.

The Virginia regulation amendments are not more restrictive than the applicable legal requirements in the sense that the EPA rule on which the state rule is based allows states discretion in how the program is implemented. EPA has stated that specific enforcement of the rules is to be delineated by the states. EPA has also stated that because the overall purpose of the NSR reforms is to encourage the installation of cleaner equipment, obstacles to the implementation of the reforms is considered to be less protective of the environment. Generally, as long as the state rule does not impede a source's ability to use the basic elements of the NSR program, EPA considers the state regulation to be equally as protective as the federal rule. The baseline elements of the EPA program are being included in the Virginia regulation; however, the state is also exercising its discretion to make modifications to the baseline in order to meet state needs.

Thus, Virginia's changes to the federal rules are intended to strike a balance between the

advantages to the federal program and the uncertainties that come with it.

1. In the EPA rule, the lookback period for determining past actual emissions for non-EGUs is specified as any consecutive 24 months in the previous 10 years. The Virginia regulation uses any consecutive 24 months in the previous 5 years, and allows sources to use another 24-month period if it is demonstrated to be more representative.

As discussed elsewhere, state rules may be equally or more protective than federal rules. Requiring a 5-year lookback instead of a 10-year lookback may limit a source's potential to find a higher baseline. This could in turn restrict a source's ability to emit and is thus inherently more protective than (rather than equivalent to) the EPA rule.

The purpose of an extended lookback is to establish a period that is *most representative* of source operation. Establishment of the most representative operation not only enables sources to plan effective emissions control strategies, it also provides the department with more accurate information on which to base long-term air quality planning strategies. While an extended lookback period will likely result in more accurate baseline determinations, a more conservative transition is best for Virginia, and the lookback has thus been limited to 5 years.

It is unlikely that a lookback period of the most immediate preceding 24 months will accurately characterize a facility's representative operation. It is also feasible that a 10-year lookback may be optimal for certain industries under certain circumstances. It is not clear, however, that the 10-year period is the best approach for all potentially affected sources statewide. First, the 10-year lookback will affect a limited subset of sources. Second, the 10-year lookback may not be optimal for all source types, and not all sources may have sufficient or reliable data for a 10-year period. Also, while there may be periods of a deep business trough, there may also be periods of unusually high production. In sum, while there exist a number of plausible scenarios in support of the 10-year period, there remains the possibility that these scenarios would not apply statewide to all source types in every business year.

During the course of the regulatory development period, department permitting and compliance staff expressed concern about the potential impact of the NSR reforms on their ability to perform accurate and timely compliance and enforcement appraisals. Specifically, staff expressed concern about the amount and quality of data being generated, and ability of both sources and the department to analyze this information in a timely and accurate manner.

The 5-year period was selected in order to enable sources to utilize a moderately extended lookback while providing the board assurance that no unusually high or low periods would be selected. A conservative transition to the new system will assure permitting, compliance, and enforcement reliability while allowing sources the enhanced flexibility of an extended lookback. Additionally, the regulation allows sources the use of a different time period in determining baseline actual emissions if a case can be made that the proposed alternative time period is more representative of normal source operation. This provision will provide sources with additional flexibility when appropriate, while providing the

oversight necessary to monitor the program and avoid compliance issues.

With respect to the lookback period for PALs, we agree that PALs provide businesses operational flexibility while protecting the environment, and have thus included nearly every PAL provision as is in the proposal. However, we also believe that a somewhat shortened lookback period for PALs is a reasonable alternative to EPA's 10-year period that will enable sources to enjoy the benefits of PALs while ensuring that Virginia's air quality resources are protected.

2. In the EPA regulation, the period used for establishing each pollutant baseline can be separate for each pollutant. The Virginia regulation requires that it be the same for all pollutants except where extenuating circumstances would allow use of different baseline periods.

Restricting sources to one baseline could prevent a source from selecting the highest baselines for a number of pollutants; this is thus inherently more protective than (rather than equivalent to) the EPA rule.

During the initial development of the regulation, department permitting and compliance staff identified the potential for a significant negative impact of the multiple pollutant baseline approach on their ability to perform accurate and timely permit issuance and compliance review. Establishment of a single baseline for all pollutants was considered to be, in part, one way to alleviate this concern. The single baseline approach considerably simplifies implementation of the rule for sources as well as the department—an important consideration in a notably complex rule.

While the proposal restricts sources to one baseline, it also allows sources to use different periods for different pollutants provided that the source can demonstrate that a different period is more appropriate. This enables sources to make the case for an alternative baseline approach and for the board to approve such alternatives.

It is a reasonable compromise to allow sources an extended lookback with the understanding that the maximum possible output of all pollution types is not an acceptable outcome.

3. The EPA regulation does not specify consequences where the owner determines there is a reasonable possibility that a project that is not a part of a major modification may result in a significant emissions increase and does not obtain a permit. The Virginia regulation specifies how the state will act should the owner fail to make an accurate determination.

The federal regulations do not address enforcement. However, EPA has informed the states that this is an intentional omission, and that enforcement strategies are to be addressed by the states. Virginia has done so: specifics as to how the state will act should the owner fail to make accurate determinations are consequences dealt with in other state regulations and state law. The language added to the regulation that spells out the consequences of significant emissions miscalculations is to provide emphasis and,

because it is codified elsewhere in the regulations, does not have an effect on existing requirements.

4. The EPA regulation requires owners to develop and maintain information to support their determination that a given project is not a part of a major modification may result in a significant emissions increase. The Virginia regulation requires advance notification of the availability of the information prior to beginning actual construction of the project.

Requiring a 30-day advance notification of the availability of information prior to beginning actual construction of the project is a requirement in addition to the federal requirements, will result in additional project oversight, and is thus inherently more protective than (rather than equivalent to) the EPA rule. Additionally, language was added to the proposal to clarify that these informational provisions do not require a source to obtain any determination from the board before beginning additional construction.

It is crucially important that the department have access to data that is adequate for determining if a source is in compliance. Given that the major NSR reforms represent a significant departure from the previously existing rules, it is in the best interest of the source to maintain information sufficient to justify its actions and to avoid compliance problems, particularly in the initial stages of program implementation. This information also contributes to an improved overall picture of the state's air quality, and is essential for long-term planning purposes. As noted in the discussion regarding the consequences of significant emissions miscalculations, there is no benefit but considerable risk to a source that cannot account for its actions.

5. The EPA rule establishes PAL duration as 10 years; the Virginia regulation contains a 5-year duration.

Requiring a 5-year duration instead of a 10-year duration allows a source ability to make changes without permitting review while providing the department with the opportunity for reasonable periodic reviews. This approach is inherently more protective than (rather than equivalent to) the EPA rule.

PALs will result in an air quality benefit and should be implemented in Virginia. Past board experience in PAL permitting, while limited, has been positive. A great deal of effort is required initially to develop the PAL; however, once the PAL is in place it achieves emissions reductions without creating a continual small-scale permitting burden on the department or the source. The lookback period and duration have been limited to 5 years in order to provide additional assurance that no unacceptably high emissions increases will result, and to allow department review and oversight.

2. **SUBJECT:** Clean Units and PCPs.

COMMENTER: U.S. EPA, Southern Environmental Law Center et al.

TEXT: The D.C. Circuit Court of Appeals vacated the Clean Unit exemption and the pollution control project (PCP) exemption. In light of the court's ruling, both the Clean Unit and PCP provisions need to be stricken from the proposal. Additionally, the hybrid emissions test for projects involving both so-called "clean units" and existing units must be withdrawn.

RESPONSE: Clean Unit and PCP provisions were vacated by the court and cannot be legally implemented at this time. EPA has also announced that states currently developing regulations should not include such provisions. Therefore, inclusion of Clean Unit and PCP provisions is not appropriate, and appropriate changes reflecting the intent of the comment have been made to the proposal..

3. **SUBJECT:** General concern about NSR program.

COMMENTER: Elizabeth B. Snell, Page D. Calisch, 3 identical emails

TEXT: These citizens generally support a strong NSR program that will meet Virginia-specific health and welfare needs.

RESPONSE: As discussed in the response to comment 1, the proposed regulation meets the basic federal legal requirements, which are mandatory, while containing alternative approaches to address air quality issues specific to Virginia. We agree that strong NSR regulations are necessary for protecting the environment, and have developed regulations that accomplish this goal.

No change has been made to the proposal as a result of this comment.

4. **SUBJECT:** General concern about NSR program.

COMMENTER: 141 emails

TEXT: Despite the severity of the Commonwealth's health concerns, Virginia is considering revisions to its NSR regulations that would weaken current law in response to federal action. EPA's changes to the federal NSR regulations would render a key portion of the Clean Air Act ineffective by allowing the country's oldest and dirtiest smokestacks, power plants, oil refineries and factories to increase pollution by unlimited amounts without ever having to adopt modern pollution controls. Virginia does not have to follow the federal lead, so long as the state regulations are at least as strong as the federal rules. NSR has been part of the Clean Air Act since 1977, and has been responsible for the reduction of thousands of pounds of soot and smog forming pollutants. I urge you to adopt major NSR regulations that are stronger than the federal recommendations and protect Virginia's existing rules that require polluters to clean up our air to protect public health.

RESPONSE: As discussed in the response to comment 1, the proposed regulation meets the basic federal legal requirements, which are mandatory, while containing alternative approaches to address air quality issues specific to Virginia. We

agree that strong NSR regulations are necessary for protecting the environment, and have developed regulations that accomplish this goal.

No change has been made to the proposal as a result of this comment.

5. **SUBJECT:** Overall regulatory stringency.

COMMENTER: Southern Environmental Law Center (SELC) on behalf of American Lung Association of Virginia, Appalachian Voices, National Parks Conservation Association, Piedmont Environmental Council, Virginia Conservation Network, Sierra Club, and Virginia League of Conservation Voters

TEXT: The board has significant leeway under federal law to customize Virginia's NSR regulations to best address the state's urgent air pollution concerns. EPA acknowledges – as the Clean Air Act requires – that "[s]tate and local jurisdictions have significant freedom to customize their NSR programs," and explicitly recognizes that a state may decide "it does not want to implement any of the new applicability provisions." Because of the Clean Air Act's emphasis on cooperative federalism, Virginia does not have to follow the federal lead on NSR. In fact, EPA has stated that it will approve a SIP choosing an alternate course, so long as the state "show[s] that its existing program is at least as stringent as [the] revised base program." The federal rule changes would greatly expand the overhauls and upgrades that can be made to aging industrial facilities without requiring compliance with NSR, leading to significant increases in pollution. By instituting a program that will require more aging facilities to comply with NSR when changes significantly increase emissions, Virginia will have no difficulty establishing that its program is "at least as stringent in all respects as" the base federal program.

RESPONSE: As discussed in the response to comment 1, we agree that the EPA rule on which the state rule is based allows states some discretion in how the program is implemented. The basic elements of the EPA program are being included in the Virginia proposal; however, the state is also exercising its discretion to make modifications to the federal rules in order to meet state needs.

No change has been made to the proposal as a result of this comment.

6. **SUBJECT:** General support of the NSR program.

COMMENTER: Southern Environmental Law Center et al.; Peter deFur

TEXT: Air pollution has serious health impacts, including heart disease, heart attacks, increased risk of death from lung cancer, and premature deaths from heart and lung problems. Each year in Virginia, approximately 1,000 people die prematurely from exposure to fine particle pollution from power plants alone. Health-related problems result in significant economic costs, with hundreds of thousands of work days and school days lost each year due to air pollution problems. Children and senior citizens are the most susceptible to temporary and permanent health impacts from air pollution.

The environmental costs of air pollution are also high. Summertime haze has reduced vistas in Shenandoah National Park by an average of 75 percent. The park also has recorded more unhealthy air days than several major cities, including Chicago and Denver, consistently ranking as one of the most polluted in the country. Equally important is the effect of emissions from coal-fired power plants on the Chesapeake Bay. Excess nitrogen causes the greatest harm to the Bay, contributing to algal blooms and widespread "dead zones." The summer of 2005 has been one of the worst for dead zones, with 41 percent of the Chesapeake Bay suffocated by a dead zone of low- or no- oxygen water. A strong NSR program is essential to ensure that Virginia lives up to its obligations under the Chesapeake 2000 Agreement.

In addition to these environmental costs, a weakening of NSR could bring adverse economic impacts to Virginia. The designation of an area as nonattainment often deters business development because of the federal restrictions that accompany a nonattainment designation. When an area falls into nonattainment, it is prohibited from bringing in new industrial development unless it can provide pollution reduction offsets to counterbalance the increases in emissions that the new sources will bring. With so many cities and counties labeled as nonattainment, Virginia faces real limits on economic growth if it does not improve air quality.

Aggravating these difficulties are the problems dirty air creates for maintaining existing businesses. One independent analysis finds that a 25 percent increase in visitation at Shenandoah National Park due to increased visibility could yield as much as $30 million annually in increased sales benefits and tax revenues, and 800 jobs for local communities surrounding the Park. Ground-level ozone pollution also costs Virginia's farmers up to $19 million annually in reduced crop yields of wheat, soybeans, cotton, peanuts, and corn. This figure excludes costs of reduced yields in wine-producing grapes, a burgeoning Virginia industry and one that is particularly vulnerable to ozone damage.
Additionally, without adequate NSR protections, existing sources would enjoy an unfair, competitive advantage over newer companies. This advantage would arise because, under the Clean Air Act, new sources already have to install modern pollution controls that are absent on many existing facilities. The NSR program simply requires existing smokestacks to install many of these same pollution control technologies whenever an older unit is modified. By requiring modified existing sources to meet many of the same requirements as new facilities, the existing NSR program helps level the playing field between entrenched and newer companies, encourages innovation in cleaner energy, creates more jobs, and spurs competition.

Accordingly, the board should resist pressure to undo important clean air protections. Instead, it should commit to maintaining a strong and healthy NSR program in Virginia and reject the EPA rollbacks on NSR.

RESPONSE: As discussed in the response to comment 1, we agree that the air quality situation in Virginia requires additional controls in order to protect public health and welfare, and that a strong NSR program is one tool by which this can be accomplished.

No change has been made to the proposal as a result of this comment.

7. **SUBJECT:** Baseline actual emissions – lookback period.

COMMENTER: Southern Environmental Law Center et al.; Peter deFur

TEXT: The D.C. Circuit concluded that the Clean Air Act "is silent on how to calculate such 'increases' in emissions," meaning that the board has some leeway in tailoring the definition of "net emissions increase" to best fit Virginia's needs. Under the existing Virginia rule, the baseline would be set using emissions data from the two years immediately proceeding construction of a project to determine the baseline figures for all measured pollutants. EPA changed the rule to allow electric utility steam generating units (EUSGUs) to select the highest polluting 2-year period out of the last 5 years of operation preceding the change. For non-EUSGUs, operators would be able to select the highest polluting consecutive two years from the last decade of operation. The proposal replaces the 10-year lookback period with a 5-year window for all sources, both EUSGUs and non-EUSGUs alike.

While the existing rule's 2-year period provides the most accurate picture of a facility's operating profile, the 5-year lookback is a noteworthy improvement over the federal rule's 10-year lookback for non-EUSGUs. Studies of emissions histories of major pollution sources suggest that limiting the lookback period for all sources to five years will significantly limit the quantity of pollution increases that would fail to trigger NSR.

At the same time, we continue to urge the board to reject both the 5- and 10-year lookback provisions as they are less protective of the environment and public health than the 2-year period that has worked well for Virginia for the last 25 years. An accurate determination of whether a change to a source results in a significant emissions increase requires a baseline emissions period representative of the source's actual pre-change emissions. A source should not be allowed to arbitrarily reach back to a period of high emissions in order to inflate baseline emissions above its actual pre-change emissions.

The proffered rationale behind these extended lookback periods is to more accurately reflect emissions throughout the business cycle of the industry. Under the current regulations, however, if the two years immediately preceding a modification are not reflective of normal source operations, an operator is already allowed to select another 2-year period that is more representative. That is, the existing regulations take into account variations in business cycles. By cherry-picking the highest emissions from out of the last several years of operation, the extended lookback period serves only one purpose: to raise the baseline emissions figure as high as possible, thereby avoiding the installation of pollution controls in all but the most extreme cases.

Because the 5-year lookback period will lead to increases in pollution when compared to the current rule, we maintain that the Virginia NSR program should apply a 2-year lookback period to all sources unless the source can show that a prior 24-month period is more

representative.

RESPONSE: As discussed in the response to comment 1, a more conservative lookback from 10 years to 5 is best for Virginia.

No change has been made to the program as a result of this comment.

8. **SUBJECT:** Individual pollutants and the baseline period.

COMMENTER: Southern Environmental Law Center et al.; Peter deFur

TEXT: We support the decision to maintain the current state requirement that sources use the same baseline period for all regulated pollutants rather than allow sources to vary baselines in order to capture the highest two years of emissions for each pollutant as permitted in the federal rule. By limiting operators to a single, 24-month period for calculating baseline actual emissions, the proposal retains a simplified program (when compared to the 2002 federal rule) and decreases the resources necessary to evaluate permit applications. Moreover, the proposal remains true to the purpose of allowing a source to select a baseline emissions period that most accurately reflects emissions during a normal business cycle. Allowing different baseline periods for different pollutants would have permitted a source to select the highest 2-year period of emissions for each pollutant influenced by factors, such as the type of fuel being used, that have nothing to do with a normal business cycle. We recommend retaining the language from the proposed regulations to require sources to use the same 24-month baseline emissions period for all affected emissions units and all pollutants.

RESPONSE: Support for the proposal is appreciated.

No change has been made to the proposal as a result of this comment.

9. **SUBJECT:** Malfunctions.

COMMENTER: Southern Environmental Law Center et al.

TEXT: The proposed regulations permit sources to include in baseline calculations emissions associated with malfunctions. Emissions from malfunctions can be quite significant and are not, by definition, part of a source's normal operating profile. Including malfunction emissions, therefore, contradicts one of the stated purposes of the EPA revisions, which is to calculate baseline emissions to more accurately reflect normal source operations. Consequently, sources should not be allowed to artificially inflate baseline calculations by including emissions increases that result from malfunctions.

That the proposed regulations also require sources to include emissions from malfunctions in projected actual emissions does not justify allowing such emissions to be included in baseline calculations. The proposed regulations provide that emissions from malfunctions are included in future emission projections only to the extent such emissions are

quantifiable. As a result, a source will likely either: 1) project that its new or modified equipment will function properly and therefore no emissions increases from equipment malfunctions will occur; or 2) claim that there is no way to project the number or frequency of any potential malfunctions for new or modified equipment and therefore such emissions are not quantifiable.

Either way, a source will be allowed to count known emissions increases from malfunctions in its baseline while omitting such increases from calculations of future emissions. To address this problem, the board should delete malfunction emissions from both sides of the equation, not allowing them to be factored into either baseline or projected actual emission calculations. Alternatively, to ensure that a source does not overexploit this malfunction loophole, it could be required to assume the same frequency, number, duration, and intensity of past malfunctions in projecting future emissions.

RESPONSE: Malfunction emissions are considered to be part of a facility's overall emissions, and records of malfunction emissions are included in every aspect of emission reporting; to remove them from the evaluation would present a unrealistic emissions picture, and would be inconsistent with the remainder of the air program. For example, when sources track their post-change emissions, many will use CEM data which will include emissions during periods of malfunction. If the malfunction emissions are excluded from the projected actuals but not from the post-change emissions, this could result in enough of a discrepancy to have it appear that NSR was triggered. Malfunctions are, by definition, unexpected, nonrecurring events, and as such can be recorded but not predicted.

No change to the proposal has been made as a result of this comment.

10. **SUBJECT:** Demand growth.

COMMENTER: Southern Environmental Law Center et al.

TEXT: When EPA first proposed adoption of an actual-to-projected-actual test for non-EUSGUs, it proposed to eliminate the demand growth exclusion from projected actuals for EUSGUs and non-EUSGUs. EPA found that "the demand growth exclusion is problematic because it is self-implementing and self-policing," and noted that in a market economy, sources often make physical changes in order to respond to market forces. Consequently, there is no plausible distinction between emissions increases due solely to demand growth as an independent factor and those changes at a source that respond to, or create new, demand growth, which then result in increased capacity utilization.

EPA later reversed course to add a demand growth exemption, while failing to provide any method for distinguishing emissions increases solely attributable to demand growth from emissions increases due to a physical change at a unit. The inclusion of a demand growth exclusion in the method for calculating projected actual emissions, therefore, creates a major loophole in the NSR program that will allow sources both to under-predict future emissions and to avoid enforcement for exceeding projected actual permit limits by

attributing the emissions to demand growth.

The demand growth exemption essentially changes the applicability test to a past-potential-to-future-actual test. That is, sources are likely to maintain that any post-change emissions increases due to output increases up to pre-change nameplate capacity are due to demand growth, regardless of the facility's pre-change actual operating profile. For these reasons, the demand growth exclusion provides no benefit for NSR enforcement, and would in fact guarantee massive, unregulated increases in pollution. It should be deleted from the proposal.

RESPONSE: This comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

11. **SUBJECT:** Enforcement, recordkeeping, and reporting.

COMMENTER: Southern Environmental Law Center et al.

TEXT: The EPA rules include a recordkeeping exemption for facilities believing that they would have "no reasonable probability" of triggering NSR. This exemption would have allowed operators to avoid keeping any "records at all – neither the data on which they based their projections nor records of actual emissions going forward." The D.C. Circuit Court of Appeals struck down this exemption, finding it to be arbitrary and capricious. The court observed, "If EPA actually knew which sources had no 'reasonable possibility' of triggering NSR, these sources would obviously have no need to keep records. The problem is that EPA has failed to explain how, absent recordkeeping, it will be able to" make that determination. EPA had argued that it could use its enforcement authority to ensure compliance with NSR. The court saw the obvious flaw in this reasoning: "EPA certainly has such inherent enforcement authority, but even inherent authority depends on evidence."

The proposal would add basic, commonsense preconstruction notice, recordkeeping, reporting, and enforcement provisions absent from the 2002 federal rules. Specifically, the proposal requires advance notice to DEQ of the availability of information before an operator can commence construction on a project that the operator determines does not trigger NSR. Additionally, the proposal outlines specific enforcement steps that DEQ will take if an owner wrongly determines that a modification does not trigger NSR. DEQ deems these requirements as necessary to ensure compliance with the NSR program for the same reasons the D.C. Circuit found the absence of notice and recordkeeping requirements in the federal rule to be arbitrary and capricious.

We support the addition of these provisions to the state program. If a source relies on projected actual emissions to avoid NSR, it should be held to its projections. The absence of these enforceability provisions would invite self-serving future emissions calculations to unlawfully avoid NSR. If post-change actual emissions are found to exceed the projections to such a degree that it would have constituted a significant emissions increase had pre-change projections been accurate, the source should be required, as proposed, to comply

with NSR as if construction had not commenced.

Additionally, preconstruction notice and post-change recordkeeping requirements greatly ease the enforcement burden on the department. Ensuring compliance with NSR requires knowledge of modifications made to existing emissions units that sources contend are not subject to NSR. The preconstruction notice requirements guarantee that DEQ will know about such modifications in a timely fashion, making enforcement more feasible. Similarly, basic recordkeeping procedures will allow DEQ to effectively monitor the real-world impact of construction and modification projects, to determine if pollution has increased, thereby triggering NSR.

RESPONSE: Support for the proposal is appreciated.

No change has been made to the proposal as a result of this comment.

12. **SUBJECT:** Netting.

COMMENTER: Southern Environmental Law Center et al.

TEXT: The proposed regulations define "major modification" as a physical change that results in a significant emissions increase and a significant net emissions increase. In other words, if a physical change results in a significant emissions increase, a source can still take advantage of these netting provisions to "net out" of NSR. However, if a physical change does not result in a significant emissions increase, but netting calculations would result in a significant net emissions increase, the source would not be required to "net in" to NSR. By allowing sources to "net out" without requiring them to "net in," the proposed regulations guarantee that modifications resulting in significant emissions increases will be able to avoid installation of pollution controls. Virginia can strengthen its NSR program and reduce air pollution statewide by requiring sources to "net in" to NSR as well as allowing them to "net out."

RESPONSE: EPA has, as a matter of longstanding policy, been implementing the general concept of "netting in," as the commenter terms it, in the PSD program for many years. Continued implementation of this policy has not resulted in any discernable environmental effect.

No change has been made to the proposal as a result of this comment.

13. **SUBJECT:** PALs in general.

COMMENTER: Southern Environmental Law Center et al.

TEXT: Experience in states that have experimented with PALs suggests that a PAL exemption would greatly complicate the Virginia NSR program, increase the burden on DEQ, and make NSR enforcement far more difficult. As noted in the STAPPA and ALAPCO New Source Review Menu of Options, "[s]tate and local permitting authorities

have noted the high labor costs of developing a PAL, since every emissions unit at the source must be evaluated, a comprehensive monitoring system to track compliance must be designed, and the baseline emissions calculations (setting the PAL) can be laborious and contentious."

More fundamentally, the PAL baseline and renewal provisions of the federal rule will allow sources to lock in historically high emissions levels for several years into the future, which would likely result in significantly more pollution than would be allowed under the state's current NSR program. The proposal attempts to address this concern by proposing a 5-year limit on the duration of a PAL, instead of the 10-year limit in the base federal rule. Although the 5-year provision is an improvement, it does not negate the fact that a PAL exemption would lead to certain increases in air pollution emitted. Accordingly, the board should delete the PAL exemption in its entirety from the Virginia program.

RESPONSE: As discussed in the response to comment 1, PALs will result in an air quality benefit and should be implemented, with some restrictions, in Virginia.

No change has been made to the proposal as a result of this comment.

14. **SUBJECT:** Malfunctions--PAL baseline.

COMMENTER: Southern Environmental Law Center et al.

TEXT: Emissions from malfunctions should not be included in a PAL baseline. The proposed regulations allow sources to include in their baseline calculations emissions associated with malfunctions. This allowance is carried over into the PAL program. Sources should not be allowed to pad their PAL baselines by including emissions increases that result from malfunctions.

RESPONSE: As discussed in the response to comment 9, malfunction emissions are considered to be part of a facility's overall emissions, and records of malfunction emissions are included in every aspect of emission reporting; to remove them from the evaluation would present a unrealistic emissions picture, and would be inconsistent with the remainder of the air program.

No change has been made to the proposal as a result of this comment.

15. **SUBJECT:** PAL and BACT/LAER

COMMENTER: Southern Environmental Law Center et al.

TEXT: A fundamental feature of NSR is its requirement that all new major sources of emissions install BACT or LAER. Under the PAL exemption in the proposed regulations, however, once a PAL is established, a source is allowed to make physical changes without triggering NSR, so long as sourcewide emissions remain below the PAL. This exclusion includes constructing new emissions units. Although a PAL can provide a

source with flexibility to make changes to existing units without triggering NSR, it should not exempt sources from installing BACT on new units. Any PAL exemption considered by the state should require a source to meet BACT requirements for any new emissions unit installed during the term of the PAL if the unit would have the potential to emit at or above the significance level for the PAL pollutant

RESPONSE: The addition of a new emissions unit, while potentially exempt under a PAL for major NSR, may nevertheless still be subject to BACT under the state minor NSR requirements. If a new unit's emissions are below the PAL level, and below the significance level for minor NSR, then its emissions are unlikely to have a significant impact on air quality. Note that if addition of a new unit would necessitate an increase in the PAL, then that unit would be required under 9 VAC 5-80-1865 L 1 c to obtain a major NSR permit regardless of the magnitude of the emissions increase resulting from it (i.e., no significant levels apply). Such an emissions unit must comply with any emissions requirements resulting from the major NSR program process (such as BACT), even though it has also become subject to the PAL. Additionally, there are a number of safeguards throughout PAL requirements designed to prevent any emissions increase that will have a negative impact on air quality.

No change has been made to the proposal as a result of this comment.

16. **SUBJECT:** PALs and synthetic minor emission limits taken to avoid NSR.

COMMENTER: Southern Environmental Law Center et al.

TEXT: The federal rule did not change the provision in the federal NSR program that requires a source that relaxes a synthetic minor emissions level taken to avoid NSR, such that the modification that avoided review would have become a major modification under the relaxed standard, to undergo NSR as though construction on the modification had not commenced. And yet, it is clear from the preamble to the federal rule that EPA intended to exempt PAL sources from the requirement of 40 CFR 52.21(r)(4). As a result, the PAL provisions of the proposed regulations unfortunately exempt PAL sources from this requirement. The exemption from the provisions of 40 CFR 52.21(r)(4) is the equivalent of permitting sources to remove pollution control equipment from existing emissions units once a PAL is established. It represents a step backward in air quality protection and should not be permitted. If a PAL exemption is contemplated, it should provide that a PAL source is required to continue to comply with synthetic minor emissions levels taken to avoid NSR, or to install BACT on the subject unit.

RESPONSE: 9 VAC 5-80-1865 A 1 c, which is based on 40 CFR 52.21(aa)(1)(ii)(c), states that any physical change in or change in the method of operation of a major stationary source that maintains its total sourcewide emissions below the PAL level, meets the rule's general PAL requirements, and complies with the PAL permit is not subject to the provisions in 9 VAC 5-80-1605 C (restrictions on relaxing enforceable emission limitations that the major stationary source used to avoid applicability of the major NSR program). 9 VAC 5-80-1605 C is analogous to 40 CFR 52.21(r)(4); both texts state:

"At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements or paragraphs (j) through (s) of this section shall apply to the source or modification as though construction had not yet commenced on the source or modification." Therefore, EPA did include the exemption in the rule at 40 CFR 52.21(aa)(1)(ii)(c), and it has been included in the proposal.

The general purpose of a PAL is for a source to maintain its emissions below a certain level in exchange for the ability to make changes without undergoing the full permitting process. There are a number of safeguards built into the PAL permitting process to prevent regression in air quality. If the PAL will result in an overall reduction in air pollution, then an exemption from minor NSR levels is appropriate.

No change has been made to the proposal as a result of this comment.

17. **SUBJECT:** PAL increase.

COMMENTER: Southern Environmental Law Center et al.

TEXT: The proposed regulations provide that a PAL can be adjusted upward during the term of the PAL if the sum of emissions from small units, plus emissions from major units assuming BACT equivalent controls, plus allowable emissions from all new and modified units, exceeds the existing PAL. If an existing unit is complying with a BACT or LAER requirement established in the previous five years, the emissions control level for the unit is assumed to represent current BACT or LAER requirements.

Given the rapid evolution of pollution control technology, one would assume that in many instances the emissions rates associated with BACT and LAER at a source will be substantially lower at the time the owner submits an application for a PAL increase than they were five years earlier. Once a PAL is established, it should not be increased based on anything other than a current BACT/LAER analysis for all major emissions units. Any PAL exemption considered by the board should not allow the PAL to be increased during the PAL effective period unless the emissions calculation is determined by conducting a new BACT/LAER analysis for all major units, regardless of when any previous analysis may have been conducted.

RESPONSE: While some types of pollution control technology evolve rapidly, most associated with BACT and LAER controls experience change on a far slower and more incremental scale. If analysis demonstrates that an upward adjustment would result in excessive emissions, then the board need not approve the adjustment: for example, 9 VAC 5-80-1865 K 2 states, "The board may set the PAL at a level that it determines to be more representative of the source's baseline actual emissions, or that it determines to be more appropriate considering air quality needs, **advances in control technology**, anticipated economic growth in the area, desire to reward or encourage the source's voluntary

emissions reductions, or other factors as specifically identified by the board in a written rationale." (Emphasis added.) A proposed increase would also be subject to the public participation requirements of 9 VAC 5-80-1865 D. There are thus a number of opportunities for the board to adjust the PAL increase in the unlikely event that a significant change in BACT or LAER occurs.

No change has been made to the proposal as a result of this comment.

18. **SUBJECT:** PAL renewal.

COMMENTER: Southern Environmental Law Center et al.

TEXT: The proposed regulations provide that at the end of its 5-year effective period, a PAL can be renewed at its existing level if the highest 2-year emissions period for each PAL pollutant during the previous five years, plus an amount equal to the applicable significance level for the PAL pollutant, equals or exceeds 80 percent of the existing PAL level. This provision effectively locks in historically high emissions levels for several years into the future. In order to prevent this result, a PAL exemption should provide that a PAL can only be renewed at a level equal to emissions levels for the two years immediately preceding a renewal application. It should also provide DEQ with the discretion to lower the PAL level if required to maintain or achieve healthy air, or if warranted by advances in pollution control technology or other relevant factors.

RESPONSE: Given that we are limiting sources to a 5-year lookback, it seems reasonable to base renewal levels on that somewhat limited lookback period. The board has a number of opportunities in the PAL review process where adjustments can be made to avoid any unusually large or inappropriate increases.

No change has been made to the proposal as a result of this comment.

19. **SUBJECT:** "Bad actor" exclusion.

COMMENTER: Southern Environmental Law Center et al.

TEXT: Because the proposed PAL exemption would allow sources to lock in historically high emissions levels, the board should ensure that any operator obtaining a PAL does not have a history of NSR or related air quality violations. Furthermore, because any PAL exemption would allow an operator to avoid NSR, this privilege should not be granted to operators that have a history of violating the program. A "bad actor" exclusion, prohibiting repeat violators from obtaining a PAL, would be beneficial in addressing these concerns.

RESPONSE: It is unlikely that a source with a poor compliance record would be able to muster the extensive documentation and public scrutiny necessarily to justify PAL issuance.

No change has been made to the proposal as a result of this comment.

20. **SUBJECT:** General support for the federal approach.

COMMENTER: Virginia Manufacturers Association

TEXT: The VMA strongly supports the federal NSR reforms and advocates adoption of the federal NSR reforms because, as EPA notes, they would greatly streamline and simplify NSR, provide certainty about NSR applicability, compliance and enforcement, and reduce unnecessary permitting burdens on companies and DEQ. The federal NSR reforms would enable Virginia's businesses to improve the productivity, reliability, and safety of manufacturing facilities on which so many citizens of the Commonwealth depend for their livelihood.

Most importantly, the federal NSR reforms would provide these critical benefits without jeopardizing air quality in the Commonwealth. In fact, after a thorough analysis, EPA has concluded that collectively, the federal reforms will result in a net environmental benefit compared to the NSR rules currently in effect in Virginia. Thus, VMA urges the board to adopt the federal NSR reforms without change.

Since the beginning of its involvement in NSR reform in Virginia, the VMA has expressed concern that Virginia should not needlessly adopt NSR rules more stringent than federally required. For years it has been the policy of the Commonwealth to eschew the imposition of regulatory requirements on its businesses and citizens "which are more restrictive than applicable federal requirements" unless a cogent showing of necessity supports a more restrictive Virginia rule. This principle is codified in § 10.1-1308 A of the Virginia Air Pollution Control Law. Furthermore, § 2.2-4014 of the state code establishes a procedure whereby the General Assembly reviews regulations during the promulgation or final adoption process. For regulations that are more restrictive than applicable federal requirements, the General Assembly has the opportunity to judge whether such regulations are truly necessary in the Commonwealth.

Virginia has the opportunity to adopt EPA's NSR reforms, which are applicable federal requirements, but the board has proposed to deviate from the federal NSR rules in ways that are more restrictive than the applicable federal requirements. Based in part on the EPA's evaluation of the environmental effects of the federal NSR reforms, the VMA believes the board and DEQ cannot sustain their burden to demonstrate that more restrictive NSR rules are necessary in Virginia. More stringent Virginia rules which stifle manufacturing innovation, safety, reliability, and operational flexibility without any incremental benefit to the environment cannot be justified as "necessary" under longstanding Virginia law and policy.

RESPONSE: We agree with the commenter that the NSR reforms will streamline and simplify NSR, provide certainty about NSR applicability, compliance and enforcement, and reduce unnecessary permitting burdens on companies and DEQ without jeopardizing air quality in the Commonwealth. We also believe that the NSR rules themselves, as well

as overarching law and regulation, enable states to tailor federal programs to meet individual state needs. As discussed in the response to comment 1, EPA allows states the flexibility to adopt rules different from the federal as long as the result is equally protective of public health and welfare. The Virginia proposal incorporates the basic elements of the federal NSR reforms, with certain limited changes needed to meet specific state air quality needs.

In its discussion regarding the baseline lookback period (see comment 27), the commenter cites a number of states competing with Virginia industry that have adopted the 10-year lookback consistent with the EPA rule: Alabama, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Ohio, South Carolina, Tennessee, and West Virginia. Of these states, Alabama, Florida, Georgia, Indiana, Louisiana, South Carolina, and Tennessee have also made numerous changes apart from the lookback period—many significant—to their state rules that differ from the federal. Note that Georgia, for example, cites as the basis for its numerous changes to the EPA rule a general state need to protect air quality and to ensure compliance and enforceability of its rules.

No change has been made to the proposal as a result of this comment.

21. **SUBJECT:** Overall balance of interests in the regulatory development process.

COMMENTER: Virginia Manufacturers Association

TEXT: In the Agency Background Document, DEQ says the deviations from the federal NSR reform regulations were "chosen as a reasonable compromise that would allow permitting flexibility while protecting enforceability and maintaining clean air protections." To the extent that there is any "compromise" inherent in NSR reform, it is already in the federal rules. In the litigation challenging the federal NSR reform regulations, Virginia expressed its belief "that the 2002 [NSR reform] Rule is an appropriate balance of potentially competing policies and interests." All of the "compromise" (i.e., "balance") that is "reasonable" (i.e., "appropriate") has already been embodied in the federal rules. Any deviation from the federal rules by Virginia would wreck the "appropriate balance of potentially competing policies and interests" in the federal NSR reform rules.

RESPONSE: Virginia was made part of the litigation by the Office of the Attorney General without input from the Executive Branch, including the Secretariat of Natural Resources. Positions expressed in the litigation therefore do not represent the views of the board or the department. Any improvement upon the federal rules would not "wreck the appropriate balance of potentially competing policies and interests in the federal NSR reform rules." To the contrary: as discussed in the response to comment 1, federal rules explicitly allow for state regulations to differ from the federal, thus allowing states to consider the rules and draw their own conclusions as to what is more protective of public health and welfare. Note that neither EPA nor the court in its review of EPA's actions consider whether EPA had correctly addressed any issues of balance. On behalf of the Commonwealth, the board exercised the state's right to modify the federal rules.

The compromise made by the department as reflected in the proposal was the result of, among other considerations, implementation of the regulatory development process as required by state and federal law and regulation. Among the many factors considered during the regulatory development process was input from a regulatory ad hoc group that was comprised of a balanced group of organizations representing different viewpoints within the Commonwealth. The primary goal of the ad hoc group process was to ensure that varying viewpoints among Virginians were considering during the initial stages of regulatory development, not to revisit conflicting opinions surrounding the federal rules that have already been addressed by EPA. Additionally, the proposal underwent a 60-day public comment period, including a public hearing, in order to obtain additional information--such as that offered by the commenter--in order to enable an informed choice as to what potential alternatives were appropriate for the state rule. Considering different opinions and arriving at a conclusion is integral to the regulatory development process when the state has the obligation to develop its own rule. Otherwise, EPA would have simply issued a standard and the state would have simply incorporated it without change.

No change has been made to the proposal as a result of this comment.

22. **SUBJECT:** General PSD issues in Virginia law.

COMMENTER: Virginia Manufacturers Association

TEXT: In the preamble to the proposed regulations, the DEQ cites the requirement in the Virginia Air Pollution Control Law that regulations "shall not promote or encourage any substantial degradation of present air quality" and shall "actively improve air quality" in the Commonwealth. There is no evidence that adopting the federal NSR reforms, instead of the board's proposed more stringent rules, would violate these obligations. EPA itself could not impose any such NSR regulations on Virginia nor can that Agency approve any such regulations into the Virginia SIP.

RESPONSE: As discussed in response to comment 1, states have the explicit right to revise the baseline federal rules as they find appropriate. Based on information gathered during the regulatory development process (including the comments and information being discussed in this document) and considered in the larger context of Virginia's air quality situation, a number of limited changes to the federal rule were identified in order to assure that the state law is met.

No change has been made to the proposal as a result of this comment.

23. **SUBJECT:** General state of air quality in Virginia/SIP submittals.

COMMENTER: Virginia Manufacturers Association

TEXT: DEQ also cites the fact that "currently, approximately one half of the Commonwealth's citizens live in areas that do not attain the [NAAQS]." DEQ fails to note this nonattainment is exclusively for the ozone NAAQS and that the department is

adequately addressing the ozone nonattainment issues in Virginia through the submission of SIP revisions to EPA. Indeed, if the DEQ's SIP submissions were not sufficient to address the nonattainment issues, EPA would not approve them. The SIP amendments DEQ has developed do not in any way depend on NSR provisions more stringent than the federal regulations. There is also good reason to believe from recent ambient air quality analyses that Virginia's ozone nonattainment areas outside of Northern Virginia may be redesignated as attainment in the near future. EPA and Virginia can best address attainment of the ozone NAAQS through the many emission control programs specifically designed for that purpose, not by making our NSR program more stringent than the federal requirements.

RESPONSE: While it is true that the Commonwealth has met and continues to meet its overall SIP requirements, nothing in the federal code or regulations prevents states from revising their SIPs as needed to meet the NAAQS; see response to comment 1. A state may have a complete and approved SIP while continuing to have violations of the NAAQS, which is very much the case in Virginia. Virginia also contains a number of areas that have been redesignated from nonattainment to maintenance, and it is important that these areas continue to meet their maintenance plan obligations and not relapse into nonattainment. Finally, the air quality in PSD areas is not allowed to deteriorate; this will not happen in the absence of ongoing state programs to address Virginia-generated emissions as well as those transported into the state from elsewhere over which Virginia has no control.

EPA's SIP requirements allow states considerable latitude in determining what measures are needed in the state to meet the federal standards, and Virginia is now taking this opportunity to do so. While we continue to meet both the specific federal requirements for controlling criteria pollutants (such as, for example, implementation of the CAIR rule) as well as their general directive for preparing state-specific plans, and while we are optimistic that implementation of these programs will ultimately result in the few remaining localities in the state not attaining the NAAQS to meet attainment, we must continue to take active steps to reduce ozone, not wait and hope for it to happen. The proposed changes to the NSR reform provisions are designed to provide added protection and certainty to a program with the potential for significant effects on the state's air quality without preventing the regulated community from taking advantage of the program's potential for implementing projects that can benefit the environment.

No change has been made to the proposal as a result of this comment.

24. **SUBJECT:** General state of air quality in Virginia/regional issues.

COMMENTER: Virginia Manufacturers Association

TEXT: In the preamble, DEQ states: "Virginia's nonattainment problems extend beyond its borders as well: a neighboring state has submitted a § 126 petition to EPA claiming that Virginia's air pollution is having a negative impact on its air quality." In its § 126 petition, North Carolina alleged that large electric generating units (EGUs) in five

states, including Virginia, are significantly contributing to nonattainment, or interfering with maintenance of attainment, of the 8-hour ozone NAAQS in North Carolina. North Carolina also alleged that large EGUs in 12 states, including Virginia, are significantly contributing to nonattainment, or interfering with maintenance of attainment, of the $PM_{2.5}$ NAAQS.

On August 24, 2005, EPA proposed to deny the petition with respect to the 8-hour ozone NAAQS. EPA's analyses show all of North Carolina to be in attainment for 8-hour ozone NAAQS following implementation of the federal Clean Air Interstate Rule. In short, implementation of the federal CAIR in Virginia, not adoption of a major NSR program more stringent than federally required, will eliminate any significant impact Virginia EGUs might be having on air quality in North Carolina.

EPA also proposed to deny North Carolina's § 126 petition with respect to the $PM_{2.5}$ NAAQS for all states, including Virginia, where the federal CAIR is implemented either by EPA's approval of a SIP or by EPA's imposition of a federal implementation plan (FIP). Implementation of the federal CAIR "would fully address the "$PM_{2.5}$-related interstate transport problem identified in the CAIR and thus . . . there would no longer be any basis for the section 126 findings" with respect to the $PM_{2.5}$ NAAQS. To the extent any of North Carolina's allegations against Virginia sources are valid, they will be thoroughly addressed by implementation of the CAIR in Virginia, either through a SIP or a FIP. In short, North Carolina's § 126 petition provides absolutely no justification for imposing more stringent NSR requirements on Virginia businesses.

RESPONSE: North Carolina's § 126 petition may not provide a legal justification for making changes to Virginia's NSR rules; however, the fact that Virginia was included in the petition suggests that there is room for improvement, regionally and within the state. The petition was one element of many considered by the department in its general assessment of overall air quality in the state as well as the region.

No change has been made to the proposal as a result of this comment.

25. **SUBJECT:** General state of air quality in Virginia/nitrogen deposition.

COMMENTER: Virginia Manufacturers Association

TEXT: In the preamble, DEQ refers to "visibility problems . . . in Virginia's national park areas." DEQ never says why a more stringent NSR program in Virginia is necessary to address visibility problems or how it would ameliorate the visibility problems. In fact, it isn't necessary. DEQ also cites "nitrogen deposition from airborne emissions contributing to serious water quality problems in Chesapeake Bay." Again, DEQ never explains why a more stringent NSR program in Virginia is necessary to address airborne NO_X deposition in the Bay or how it would ameliorate this problem. In fact, it isn't necessary and would have little or no effect on nitrogen deposition into the Bay. NSR is not the mechanism to address these air quality concerns. There are numerous other, much more effective air quality programs specifically designed to address these concerns.

RESPONSE: As discussed in comment 1, regional haze and nitrogen deposition are among a number of air quality problems facing the Commonwealth. No, changes to some aspects of the federal NSR reforms will not directly solve visibility problems in Virginia's Class I areas or water quality problems in the Bay. The fact remains that pollution in these areas is serious, which suggests that additional measures beyond those in the baseline federal rules are needed. As the commenter states in comment 26, the purpose of the PSD program is not to reduce emissions, but to limit new emissions so as to prevent significant deterioration of air quality in the attainment areas. If the air in Shenandoah National Park has indeed deteriorated to the point where portions of it have been declared nonattainment, then surely it and other PSD areas in the state need deteriorate no further.

No change has been made to the proposal as a result of this comment.

26. **SUBJECT:** General state of air quality in Virginia/other federal programs.

COMMENTER: Virginia Manufacturers Association

TEXT: NSR is not the mechanism to address the air quality concerns DEQ cites in the preamble because it is not a control program for reducing emissions. EPA has stated this concisely: "Major NSR is not a measure to reduce emissions to assure attainment." It's clear that the purpose of the PSD program is not to reduce emissions, but to limit new emissions so as to prevent significant deterioration of air quality in the attainment areas. As for nonattainment NSR, EPA explains: "The major NSR program's purpose 'is to permit States to allow continued growth or expansion in nonattainment areas, so long as this growth or expansion is undertaken in a manner consistent with the goals and objectives of the Clean Air Act.'" In short, NSR is not a program designed to reduce emissions to improve air quality.

EPA has adopted a host of federal programs, applicable in Virginia, that are specifically designed to reduce emissions to improve air quality and that address the air quality concerns DEQ cites in the preamble. These programs mandate massive emission reductions from both new and existing sources. Prime examples are the federal Acid Rain Program, the NO_X SIP Call, the Regional Haze Program, and the Clean Air Interstate Rule. The Acid Rain Program, which applies to large coal-fired electric generating units, has resulted in huge decreases in emissions of SO_2 and NO_X and dramatically improved air quality nationwide. To further reduce emissions of NO_X, one of the principal precursors to the formation of atmospheric ozone, in the East, EPA promulgated the NO_X SIP Call. In conformance with the NO_X SIP call, the board adopted the NO_X Budget Trading Program. The NO_X Budget Trading Regulations require Virginia sources to make massive additional reductions of NO_X emissions. The federal Regional Haze Program is designed to implement the mandate of the Clean Air Act to restore and enhance visibility in our national parks and wilderness areas. Virginia must develop regulations to require best available retrofit technology (BART) at those sources DEQ determines are interfering with visibility in Class I areas.

In addition, Virginia must soon adopt regulations to meet the requirements of the federal CAIR. The DEQ has already begun this rulemaking process. CAIR will result in further, deep cuts in emissions from new and existing sources in Virginia and neighboring states. In sum, EPA and Virginia already have several key emission control programs specifically designed to address ozone nonattainment, visibility, and acid deposition through massive reductions in NO_X, SO_2, $PM_{2.5}$, and other emissions from both new and existing sources.

In the preamble, DEQ concludes: "In the larger context, it is clear that the state needs to take additional steps beyond the immediate legal requirements for nonattainment and PSD areas if larger, statewide issues are to be addressed." We disagree there is any need for more stringent NSR regulations in Virginia, much less that such a need is "clear." In the larger context of the specifically tailored emission control and air quality programs described above (and others, e.g., mobile source control programs), an NSR program more stringent than the federal program is neither a necessary nor a cost-effective way to improve air quality in the Commonwealth. In short, we do not believe the board or DEQ has shown, or is able to show, that Virginia's NSR regulations must be more stringent than federally required.

RESPONSE: We agree that the purpose of the NSR program is to permit states to allow continued industrial growth **so long as this growth or expansion is undertaken in a manner consistent with the goals and objectives of the Clean Air Act**. (Emphasis added.) As discussed in the response to comment 1, the proposed changes to the NSR program are intended to implement the NSR reform provisions while ensuring that Virginia can meet the overall goals and objectives of the Clean Air Act. Virginia is in the process of implementing the EPA measures enumerated by the commenter, and we agree that these programs will contribute to improvements in air quality. § 10.1-1308 of the Code of Virginia states, “The regulations shall not promote or encourage any substantial degradation of present air quality in any air basin or region which has an air quality superior to that stipulated in the regulations.” Given the uncertainty of specific impacts that implementing the federal rules will have on the areas of the state that are attaining the national standards, and given that there are areas in the state that continually fail to meet national standards, certain limitations on some aspects of the federal rules may contribute toward meeting these state-specific needs.

No change has been made to the proposal as a result of this comment.

27. **SUBJECT:** Past actual emissions baselines.

COMMENTER: Virginia Manufacturers Association, Dominion

TEXT: Part of the solution to NSR capacity confiscation in the federal reform rules is the use of a "long lookback" period to determine past actual emissions. Under the federal NSR reform rules, businesses can look back to any consecutive 24-month period in the past 10 years to set the baseline emission rates. (The baseline rates must reflect any new emission reduction requirements imposed since this 24-month period.) EPA explained:

> The new [long lookback] baseline procedure is specifically designed to allow a source to consider a full business cycle in determining whether there will be an emissions increase from a physical or operational change. . . . Consequently, the new procedure ensures that a source seeking to make changes at its facility at a time when utilization may not be at its highest can use a normal business cycle baseline by allowing the source to identify capacity actually used in order to determine an average annual emissions rate from which to calculate any projected actual emissions resulting from the change.

EPA explained further that the 10-year lookback approach would "eliminate uncertainty and delay over which period is most representative" and have the added benefit of "removal of the existing rule's effect of 'confiscating capacity' when changes occur during a low point in a source's natural business cycle."

Virginia businesses must be allowed to have the benefit of the full 10-year lookback in the federal NSR reform rules. NSR capacity confiscation is not a theoretical concern to Virginia businesses. In 1999, before EPA promulgated its proposed 10-year lookback rule, Congressman Rick Boucher, representing Virginia's 9th Congressional District, wrote to the Assistant EPA Administrator to express his concern with the effects of NSR capacity confiscation on Virginia businesses. Rep. Boucher noted:

> We have, however, lost production ability in Virginia as a result of the application of this [NSR] regulation. The loss occurs when sources apply for pre-construction permits, at which time a calculation is made comparing potential production to actual production during a previous window of time. Should it be determined that the source had not produced at its permitted potential during this window, the source would lose the difference between the potential permitted level and the actual production level during that period.

EPA promulgated a 10-year lookback in the federal NSR reform rules because the Agency recognized that any shorter period would perpetuate capacity confiscation for most sectors of American business. American businesses routinely experience downturns in business cycles spanning much longer than five years. EPA commissioned a study "to better understand what time period best represents an industry's normal business cycle." EPA "concluded from the study that 10 years of data is reasonable to capture an entire industry cycle."

EPA's selection of a 10-year lookback period is clearly supported by other analyses of American manufacturing data for the past 30 years. Our own data clearly illustrate that American manufacturing experiences business cycles much longer than five years. The data show business cycles with trough to trough durations of approximately seven years. These cycles in American manufacturing coincide with worldwide business cycles.

Virginia's manufacturers compete in the national and worldwide markets and are similarly affected by cyclical swings in supply and demand. An analysis was performed for one large Virginia manufacturing facility, Celanese Acetate. Production data for this plant from 1985 to the present showed production troughs in 1987 and 2000 separated by 13 years. The plant is currently experiencing increased product demand as domestic and worldwide supply and demand shift into a different part of the business cycle. In sum, it is clear that Virginia manufacturers must have the full 10-year lookback period to avoid perpetuation of NSR capacity confiscation.

A 5-year lookback would place Virginia manufacturers at a significant competitive disadvantage compared to their competitors subject to NSR rules with a 10-year lookback period. Virginia's manufacturers compete heavily with manufacturers located in neighboring Southern and Midwestern states: Alabama, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Ohio, South Carolina, Tennessee, and West Virginia. All of these states have adopted or proposed NSR reform rules with a 10-year lookback period. North Carolina is the only state among Virginia's prime competitors that has adopted a 5-year lookback period.

The important benefits of the full 10-year lookback can be achieved without any jeopardy to the environment. EPA notes that the 10-year lookback baseline methodology

> will not alter the baseline at all for most sources, including (1) new sources, (2) modifications in the largest-emitting category, coal-fired power plants, (3) modifications at any source where emissions have been highest in recent years, and (4) modifications at any source where emissions have been relatively stable. Together these categories comprise an estimated 90 percent of the emissions benefits from the NSR Program.

In other words, the 10-year lookback baseline would apply to only a small subset of the total universe of sources subject to the NSR program – those facilities where emissions before the facility change are lower as a result of decreased capacity utilization due to decreased market demand, some kind of outage, or other circumstances.

EPA says it is uncertain what exactly the emissions impacts would be from modifications undertaken at this limited subset of sources. However, EPA notes “that any overall consequences would be negligible . . . because the number of sources receiving different baselines likely represents a very small fraction of the overall NSR permit universe, excludes new sources and coal fired power plants, and because the baseline may shift in either direction [to a higher or a lower baseline].” EPA concludes “that the change in baseline . . . will not result in any significant change to the environmental benefits derived from the NSR program.”

The petitioners in the litigation challenging EPA's final NSR reform rules challenged the legality of EPA's 10-year lookback period, arguing that it is impermissible under the Clean Air Act and that it is arbitrary and capricious. The court rejected both claims, concluding that EPA supported its selection of the 10-year lookback period "with detailed and reasoned analysis based on its experience and expertise." Specifically, the court said "the business cycle study supports EPA's conclusion that a 10-year lookback period 'is a fair and representative time frame for encompassing a source's normal business cycle.'" The court noted that "[b]ased on 'their experience over the years in implementing the NSR program,' state Intervenors [including Virginia] agree that a 10-year lookback period is reasonable.

In the preamble, DEQ solicits comment on whether past actual emission baselines could be based on any consecutive 24-month period during the lookback period (as proposed) or, alternatively, should be based on some other value, such as the average of the lookback period. Averaging emissions across the entire lookback period would merely perpetuate NSR capacity confiscation. Using the average emission rate over the lookback

period rather than the highest consecutive 24-month period would confiscate from the source the productive capacity equivalent to the difference between the average emission rate during the lookback period and the emission rate for the highest 24-month period during the lookback period. In instances where the lookback period encompasses a deep business cycle trough, that confiscation would be very significant. The VMA advocates using the highest consecutive 24-month period in the past 10 years to set the past actual emission baselines. We cannot support any of the alternatives posed by DEQ that are more stringent than the federal NSR provisions.

In sum, to eliminate wasteful NSR capacity confiscation, Virginia businesses must be allowed to use any consecutive 24-month period during the past 10 years to determine a source's past actual emissions baselines.

RESPONSE: As discussed in the response to comment 1, the 5-year period was selected in order to enable sources to utilize a moderately extended lookback while providing the board assurance that no unusually high or low periods would be selected. Additionally, the regulation allows non-EGUs the use of a different time period in determining baseline actual emissions if a case can be made that the proposed alternative time period is more representative of normal source operation. This provision will provide sources with additional flexibility when appropriate, while providing the oversight necessary to monitor the program and avoid compliance issues. The commenter observes that EPA supported its selection of the 10-year lookback period "with detailed and reasoned analysis based on its experience and expertise"; the board has done likewise.

No change has been made to the proposal as a result of this comment.

27. **SUBJECT:** Baseline periods.

COMMENTER: Virginia Manufacturers Association

TEXT: The federal NSR reform regulations allow sources the option to use different baseline periods (i.e., different 24-month periods within the past 10 years) to determine the past actual emission baselines for different pollutants. The proposed Virginia NSR reform regulations would require sources to use the same baseline period for all pollutants. This is clearly more stringent than the federal rule. This restriction is not only more stringent than the federal NSR reform regulations, it is more stringent than Virginia's current NSR regulations (similar to the old federal NSR regulations). Neither the DEQ nor the board has provided any rationale for making Virginia's rule more stringent that the federal rule or the current Virginia rule.

Virginia businesses need the flexibility to determine the past actual emissions baselines on a pollutant-by-pollutant basis. VMA's member companies use a variety of production materials and fuels depending on product demands and energy prices. The mix of production materials and fuels may vary such that at any one time a facility is using lower emitting production materials (e.g., lower VOC content) and higher emitting fuel (e.g., oil versus natural gas). Later, the facility may switch to higher VOC production materials

because of new product demands and to natural gas fuel because of lower energy prices. Which scenario is "normal" past operation? Both are, so that in the future if the facility must produce a product using higher VOC materials and oil rather than natural gas, it is still normal operation of the facility, and the source should be allowed the maximum flexibility to operate under this normal condition. Restricting Virginia sources to one baseline for all normal operating scenarios perpetuates NSR confiscation because the source owner is forced to give up productive capacity at one or more manufacturing units or energy generating units.

Restricting sources to the same past actual emissions baseline is needlessly more stringent than the current federal and Virginia requirements. Neither DEQ nor the board has provided any rationale for making Virginia's rule more stringent. The Department of Planning and Budget (DPB) noted in the preamble to the proposed NSR reform regulations: "The only available assessment of this change on emissions is provided by EPA. EPA's analysis that is based on the more flexible 10 year lookback and less stringent pollutant specific time frame selection finds that the net impact on emissions could be an increase or decrease, but is likely to be insignificant." DPB concluded its analysis of the board's proposed baseline rules by stating:

> These more stringent provisions could possibly reduce some potential net benefits to the sources and the environment when compared to the case where the sources were allowed to operate under more flexible time periods as recommended by EPA. Thus, the net benefits from this regulatory action could be maximized if more flexible time frames are incorporated before the final regulations are published.

The VMA thoroughly concurs with DPB's assessment.

RESPONSE: As discussed in the response to comment 1, the Commonwealth's overall air quality situation can benefit from a number of changes to the EPA requirements.

DPB's analysis is heavily dependent on the analysis EPA conducted in support of the federal regulatory action, which is discussed in detail in the response to comment 1. Under the circumstances, it is not prudent to rely uncritically on EPA's analysis in the context of assessing Virginia's air quality needs.

No change has been made to the proposal as a result of this comment.

28. **SUBJECT:** Demand growth.

COMMENTER: Virginia Manufacturers Association

TEXT: After careful consideration of numerous comments, EPA decided to exclude post-change emission increases that do not result from the physical or operational change, but rather are due to "independent factors," such as a growth in the demand for the facility's products. The VMA believes it is essential that projected emissions exclude emissions increases resulting from independent factors such as demand growth. Where post-change emission increases come from increased utilization of plant capacity to meet higher product demand, "the increased capacity utilization cannot be said to result from the

change and therefore may rightfully be excluded from the projection of the emissions unit's future-actual emissions." The reason is clear -- "the [Clean Air Act] only applies the major NSR requirements to emissions increases that are the result of a physical or operational change." The causation principle in the Clean Air Act makes it illegal to require the inclusion of emission increases resulting from independent factors, such as demand growth, in the calculation of the projected actual emissions following the facility change. Therefore, VMA strongly supports retaining the demand growth exclusion in the proposed Virginia NSR reform regulations.

RESPONSE: While the demand growth exclusion contributes to a more accurate representation of source emissions, there also exists some uncertainty with regard to how this information can be quantified. Demand growth increases the complexity of an already complex program. It also relies on a source's ability to implement and monitor the program without agency oversight. For these reasons, a demand growth exclusion could potentially create significant compliance problems. Therefore, as discussed in the response to comment 10, the demand growth exclusion has been removed from the proposal.

29. **SUBJECT:** Recordkeeping and reporting.

COMMENTER: Virginia Manufacturers Association, Dominion

TEXT: The VMA believes the records required in the proposed Virginia regulations at 9 VAC 5-80-1785 B (which mirror the corresponding federal regulations) are clearly sufficient to document the source owner's projection of any post-change emission increases, including any emission increases excluded as the result of independent factors (e.g., demand growth).

The federal NSR reform regulations do not make the source's projected actual emissions enforceable, e.g., by incorporating the projections as emission limits in a permit. After considering the public comments, including concerns expressed by some state agencies "that they do not have the resources to adequately administer a program that would require permits to be issued for every physical or operational change at a major stationary source," EPA decided "that such a requirement may place an unmanageable resource burden on reviewing authorities" and "that it is not necessary to make [a source's] future projections enforceable in order to adequately enforce the major NSR requirements." The VMA agrees with EPA's assessment.

The proposed Virginia regulations add an extra reporting obligation at 9 VAC 5-80-1785 E that is not found in the corresponding federal NSR regulations. This reporting burden goes beyond not only what is required by the federal NSR regulations, but also goes beyond what is required by the current Virginia NSR regulations. The VMA believes this added reporting burden is unnecessary and unlikely to accomplish more than making additional work for both Virginia businesses and DEQ. The reason is simple. As EPA notes:

> We anticipate a large majority of the projects that are not major modifications may nonetheless be required to undergo a permit action through States' minor NSR permit programs. In such cases, the minor NSR permitting procedures could provide an opportunity to ensure that [the source's] reviewing authority agrees with [the source's]

> emission projections. Requiring a separate notification would not provide the reviewing authority with any additional information in such circumstances. Accordingly, we believe today's requirements provide reviewing agencies with the ability to obtain all the information necessary to ensure compliance.

It is very likely that Virginia's minor NSR requirements will apply to those projects for which there is a "reasonable possibility" that major NSR might apply. As EPA notes, the source's compliance with Virginia's minor NSR program will provide the DEQ with all the information necessary to enforce the major NSR requirements. Thus, the VMA advocates the deletion of the needless, additional burden of providing the DEQ with advance reports of facility changes with a "reasonable possibility" of triggering major NSR.

The proposed Virginia regulations contain a provision (9 VAC 5-80-1785 E) that if the DEQ believes a project which the source owner claimed did not trigger major NSR actually did trigger major NSR, the DEQ "will proceed as if the owner is in violation of [the major NSR requirements] and may institute appropriate enforcement action." This clearly states that source owners must ensure any physical or operational changes do not trigger major NSR or face the enforcement consequences.

RESPONSE: As discussed in the response to comment 1, it is important that the department have access to data adequate to determine if a source is in compliance.

No change has been made to the proposal as a result of this comment.

30. **SUBJECT:** Malfunctions.

COMMENTER: Virginia Manufacturers Association

TEXT: The VMA favors the approach in the proposed Virginia regulations of including emissions arising from malfunctions in both the past actual emissions baselines and the projected actual emissions following the proposed facility change. This accounting is both consistent (looking backward and forward) and realistic. Under certain circumstances, federal and Virginia regulations allow an "affirmative defense" against enforcement penalties for excess emissions resulting from a malfunction. Virginia regulations (9 VAC 5-20-180 G) go even farther in some circumstances and provide that excess emissions from malfunctions do not constitute a violation. The VMA does not believe these provisions should alter the approach of including emissions occurring during malfunction events in the calculations of the past actual emissions baselines or projected actual emissions following a proposed facility change.

RESPONSE: Support for the proposal is appreciated. As discussed in the response to comment 9, malfunction emissions are an integral part of a source's overall emissions profile and cannot be removed for the purpose of determining the baseline.

No change has been made to the proposal as a result of this comment.

31. **SUBJECT:** Netting.

COMMENTER: Virginia Manufacturers Association

TEXT: Federal and Virginia NSR regulations have never required aggregation of separate source changes for the purposes of determining NSR applicability. As EPA has explained:

> If the proposed emissions increase at a major source is ***by itself*** (without considering any decreases) less than "significant", EPA policy does not require consideration of previous contemporaneous small (i.e., less than significant) emissions increases at the source. In other words, the netting equation (the summation of contemporaneous emissions increases and decreases) is not triggered unless there will be a significant emissions increase ***from the proposed modification***.

There is no reason for the board to deviate from this longstanding approach to NSR applicability and make Virginia's new NSR regulations needlessly more stringent than the current Virginia rules they will replace.

RESPONSE: Support for the proposal is appreciated.

No change has been made to the proposal as a result of this comment.

32. **SUBJECT:** General support for PALs.

COMMENTER: Virginia Manufacturers Association

TEXT: The VMA strongly supports the inclusion of the federal PAL permitting provisions into Virginia's NSR reform regulations. The PAL provisions provide businesses with the opportunity to maximize their flexibility to make facility changes in exchange for capping the facility's emissions through limitations in a minor NSR or operating permit. Emission caps (annual emission limits) would be set near the past actual emission rates for the facility.

VMA strongly supports PAL permitting because of the operational flexibility it provides. Many of our member companies compete in the fast-paced, global marketplace where the ability to rapidly respond to new product and market demands is critical for survival. Our member companies have had critical business opportunities jeopardized and even lost because NSR permitting has delayed their response to new market and production demands. New source review and permitting must be completed before a company begins construction on a particular facility change. Very often, Virginia businesses simply do not have enough lead time to accommodate the lengthy major NSR process without jeopardizing their ability to respond to global market demands.

Because PAL permitting was not generally available under the federal and Virginia NSR rules in the mid-1990s, Merck, a pharmaceutical company with a manufacturing facility in Elkton, Virginia, obtained a site-specific PAL-type permit through EPA's Project XL. Merck must be able to respond rapidly to new and increased production demands from the medical community. The risk of protracted delays in obtaining one or more major NSR

permits in order to respond to new or increased product demands was too great. Merck needed a PAL-type permit that would allow the necessary operational flexibility. However, the only path to a PAL-type permit available at that time under the federal and Virginia NSR rules was the circuitous path of the Project XL process. PAL permitting under the NSR reform rules would provide critical operational flexibility to Virginia businesses at a fraction of the effort expended by Merck and DEQ on the Project XL process.

Virginia can provide its businesses the benefits of PAL permitting without any jeopardy to air quality in the Commonwealth. EPA has estimated the environmental impacts of PAL permitting and concluded "that PALs are likely to result in a net environmental benefit." As EPA explains: "These environmental benefits (which represent only a portion of the overall benefits of the PAL approach) arise primarily because of the incentives created when a facility caps its emissions in exchange for future flexibility to make changes without further NSR permit process." The VMA believes that when they are no longer inhibited by the threat of adverse business impacts from major NSR, Virginia businesses will be more likely to pursue projects that further reduce actual emissions.

EPA undertook a detailed analysis of the environmental impacts of PAL permitting in three manufacturing sectors – pharmaceuticals, semiconductors, and automobiles. EPA estimated

> that PALs will result in at least 3,400 to 17,000 tons per year of VOC reductions nationally. Because our analysis focuses only on these three categories, it is likely an underestimate, as several other source categories will certainly make use of PALs, though to a lesser degree in some instances. . . . this analysis illustrates that the benefits of PALs are likely to be on the order of magnitude of tens of thousands of tons per year of VOC.

EPA points out that even if this is not the case, PALs are still a "no-lose" proposition for the environment:

> Finally, it is important to note that, should sources be unable to reduce their emissions as significantly as we have seen in these early cases, the emissions from the facility would still be capped, assuring no worse emissions than under the current rules. In the extreme case where a facility could not meet its cap, its emissions increases would be subject to NSR, just as they are today. Thus, the worst-case emissions scenario from adoption of the PAL option is no worse than the current rule. However, as noted above, evidence to date shows that the far more likely result is that net benefits will occur.

Merck's experience in Virginia confirms EPA's analysis. During the development of PAL-type permit for Merck's Elkton facility, some expressed doubt that the environmental benefits expected from the project would actually be achieved. These doubts were similar to those expressed during the NSR reform rulemaking concerning the environmental benefits estimated by EPA. Contrary to the skeptics' predictions, total criteria pollutant emissions from the facility today are about 10% of what they were prior to the issuance of that permit. In addition, VOC emissions have not increased significantly, and are actually today at about 25% of the level prior to issuance of the permit. While Merck's success may not always be duplicated, PAL permitting under the NSR reform rules will consistently result in significant benefits for Virginia's environment.

RESPONSE: Support for the proposal is appreciated. As discussed in the

response to comment 1, we agree that PAL permitting should result in an overall net benefit to the environment.

No change has been made to the proposal as a result of this comment.

33. **SUBJECT:** 5-year lookback for PALs.

COMMENTER: Virginia Manufacturers Association

TEXT: To maximize the benefits of PAL permitting, it must be attractive to Virginia businesses. To make it attractive, the board must adopt regulations allowing PAL limits to be set for each individual pollutant using the highest consecutive 24-month period during the past 10 years for that pollutant -- the same method VMA advocates for setting the source's past actual emissions baselines. For all of the many reasons discussed above with respect to setting past actual emission baselines, PAL permit limits based on a 5-year lookback period will not provide Virginia businesses with sufficient emissions "head room" to operate their facilities during the upturns in their business cycles. This is crucial to the vitality of Virginia's manufacturers. Several of our member companies have already determined that PAL permit limits based on a 5-year lookback would be too restrictive for them. In short, so the full benefits of this worthwhile permitting program will be realized in Virginia, the board must allow the use of the 10-year lookback to set the PAL permit limits.

RESPONSE: As discussed in the response to comment 1, a somewhat shortened lookback period will enable sources to enjoy the benefits of PALs while ensuring that Virginia’s air quality resources are protected.

No change has been made to the proposal as a result of this comment.

34. **SUBJECT:** PAL renewal

COMMENTER: Virginia Manufacturers Association

TEXT: The board proposes to adopt the federal approach to renewal of PAL permits. The VMA fully supports this approach. We believe it balances concerns about perpetuating higher than necessary emissions limits for PAL sources with source owners' concerns that productive capacity unused in the recent past would be confiscated by an arbitrary ratcheting downward of the source's PAL permit limits. Virginia businesses must have some certainty that they will be able to react to market upturns. The prospect of having productive capacity confiscated by severely reducing allowable emissions during permit renewal does not promote the certainty Virginia businesses must have.

RESPONSE: Support for the proposal is appreciated.

No change has been made to the proposal as a result of this comment.

35. **SUBJECT:** PAL duration.

COMMENTER: Virginia Manufacturers Association

TEXT: Unlike the federal regulations which establish a 10-year duration for PAL permits, the proposed Virginia regulations restrict PAL permits to only five years. Virginia businesses need the certainty of the 10-year permit duration provided in the federal regulations. This feature of the board's proposed regulations makes them unattractive to many Virginia businesses.

RESPONSE: As discussed in the response to comment 1, the 5-year lookback provides an increase over the original 2-year lookback while providing additional assurance to the state that emissions will be adequately controlled.

No change has been made to the proposal as a result of this comment.

36. **SUBJECT:** Definition of "federally enforceable."

COMMENTER: Virginia Manufacturers Association

TEXT: The definition of "federally enforceable" is not the same as the definition in the federal regulations at 40 CFR 52.21(b)(17). Why not?

RESPONSE: As discussed in the response to comment 56, the current definition is outdated and inconsistent with other EPA policies and regulations. It has therefore been updated to be more comprehensive.

No change has been made to the proposal as a result of this comment.

37. **SUBJECT:** Definition of "major emissions unit."

COMMENTER: Virginia Manufacturers Association

TEXT: The definition of "major emissions unit" is not the same as the definition in the federal regulations at 40 CFR 52.21(aa)(2)(iv)(a) and (b). Why not? It appears the 100 ton per year threshold for a "major emissions unit" is stated twice -- once in subsection (i) and again by reference to subdivision a 1 in the definition of "major stationary source" because that provision also sets a 100 ton per year threshold (for 28 specific source categories).

RESPONSE: This comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

38. **SUBJECT:** Definition of "major modification."

COMMENTER: Virginia Manufacturers Association

TEXT: Subdivision c of the definition of "major modification" excludes certain activities from the meaning of the term "physical change or change in the method of operation." One such exclusion is the "use of an alternative fuel or raw material by a stationary source" under what should be three separate, independent sets of circumstances. The proposed regulations improperly link the first and second sets of circumstances with the third set of circumstances using the conjunctive "and" instead of the disjunctive "or." Under federal and current Virginia NSR rules, a source can switch to an alternative fuel or raw material if it was capable of accommodating that alternative fuel or raw material or if the use is approved by permit. There is no additional requirement that the owner demonstrate through a trial burn that emissions resulting from the use of the alternative fuel or raw material would decrease.

We realize the language in subdivision c (5) (c) appears in the State Air Pollution Control Law, but we have never understood why. If a switch to an alternative fuel or raw material would decrease emissions, the switch would not be a modification because of the second (emissions impact) part of the test for a modification. Thus, there is no need to exclude the switch from the meaning of physical or operational change in the first part of the test for a modification. In any event, the proposed regulation improperly makes a demonstration of decreased emissions using a trial burn a necessary condition for the exclusion. There is no basis in the law or past EPA or DEQ practice to support this. VMA believes the disjunctive "or" must be substituted for the conjunctive "and" in subdivision c(5)(b) of this definition.

RESPONSE: The substance of the comment is correct; however, because it is a matter of state law, this provision cannot be removed from the regulation. See also the response to comment 58.

No change has been made to the proposal as a result of this comment.

39. **SUBJECT:** Definition of "net emissions increase."

COMMENTER: Virginia Manufacturers Association

TEXT: Subdivision c of the definition of "net emissions increase" sets the conditions under which an emissions increase or decrease is "creditable" for netting purposes. Subdivision c (i) repeats the timing requirements for emission increases and decreases previously set out in subdivisions b (1) and (2) of this definition. Thus, it would appear the repeat of these timing requirements in subdivision c (i) is unnecessary.

RESPONSE: Subdivision (b) provides the criteria for determining if an increase or decrease is **contemporaneous**. Subdivision (c) provides the criteria for determining if an increase or decrease is **creditable**. We agree that the outcome of this language is somewhat redundant, but the criteria are meant to cover two different requirements and thus need to be described separately.

No change has been made to the proposal as a result of this comment.

40. **SUBJECT:** Definition of "potential to emit."

COMMENTER: Virginia Manufacturers Association

TEXT: The last sentence in the definition of "potential to emit" does not track the corresponding federal definition set out in 40 CFR 52.21(aa)(2)(ii)(b). That federal provision states that for purposes of PALs, "An emissions unit's potential to emit shall be determined using the definition in paragraph (b)(4) of this section [52.21], except that the words or 'enforceable as a practical matter' should be added after 'federally enforceable.'" The proposed Virginia regulation does not mirror this. The last sentence of the proposed definition should be changed to read: ". . . is federally and state enforceable or enforceable as a practical matter."

RESPONSE: This comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

41. **SUBJECT:** PAL public participation procedures.

COMMENTER: Virginia Manufacturers Association

TEXT: 9 VAC 5-80-1865 D would require the use of the elaborate and time consuming public participation procedures in 9 VAC 5-80-1775 for PAL permitting. However, PALs can be set for a source using permits issued under the minor NSR and state operating permit programs. (See the definition of "PAL permit.") The public process in 9 VAC 5-80-1775 is unnecessary overkill considering that only actuals PAL permits can be issued. These PAL permits cannot authorize any significant increase in emissions. We see no need for the elaborate and time consuming public process in 5-80-1775 for PAL permits that must always restrict emissions to less than the major NSR significance levels.

RESPONSE: We agree that the public process for major NSR permits is not necessarily appropriate for minor NSR permits, state operating permits, or federal operating permits, and have thus revised the proposal in order to more accurately reflect the public participation requirements that vary from one type of permit to another.

42. **SUBJECT:** Changes to permits.

COMMENTER: Virginia Manufacturers Association

TEXT: 9 VAC 5-80-1925, 1935, 1945, and 1955, which govern changes to permits, would be entirely new in Virginia's major NSR regulations. It appears these regulatory provisions were borrowed from Virginia's Title V regulations. However, in many cases, the regulatory language creates uncertainties or worse problems. The reason for this is that Title V is an operating permit program whereas NSR is a preconstruction permit program. To illustrate our concern, we are not sure how the provisions in 9 VAC 5-80-1945 G are to work. This subsection authorizes a source owner to make changes

proposed in the minor permit amendment request immediately after filing the request with the DEQ. This suggests circumstances in which a source owner might make changes at a facility without first obtaining an amendment to the source's major NSR permit. We are having difficulty envisioning such circumstances and are concerned that our members might misconstrue the extent of this and similar provisions in the permit amendment sections of the proposed regulations.

RESPONSE: These provisions, which did originate with the Title V program, were first added to Article 9 in response to a need identified in Virginia for specific steps needed for these types of permit actions; the opportunity is now being taken to add these provisions to Article 8. These provisions provide both the regulated community and the department greatly enhanced certainty as to how certain actions must be implemented in the permitting process, and improve permitting efficiency overall. This system has worked well in the nonattainment program (Article 9); it is now time to make the nonattainment rule (Article 8) consistent with this process.

We appreciate the differences of purpose between the Title V and NSR programs, but cannot see any possibility for confusion in 9 VAC 5-80-1945 G (minor permit amendments). Note that when these provisions were originally proposed for Article 9, neither this commenter—nor anyone else--offered comment on that particular provision or with any other aspect of the added permit change provisions; nor to our knowledge have any other specific issues such as the one the commenter mentions arisen.

No change has been made to the proposal as a result of this comment.

43. **SUBJECT:** Definition of “owner.”

COMMENTER: U.S. EPA

TEXT: Throughout the proposal where the EPA regulations state “owner or operator”, the Commonwealth regulations offer the language “owner” only. Please clarify whether or not DEQ issues permits to “operators” and whether they have the same regulatory obligations as “owner.”

RESPONSE: The definition of “owner” in 9 VAC 5-10-20 of 9 VAC 5 Chapter 10 (general definitions) includes operators. Therefore, “operators” have the same regulatory obligations as “owners.”

No change has been made to the proposal as a result of this comment.

44. **SUBJECT:** Use of “shall” and “will.”

COMMENTER: U.S. EPA

TEXT: There are numerous references in Articles 8 and 9 and one in Article 6 at 9-VAC-5-80-1110 C 1 that change “will” for “shall” and vice versa. We understand that

Virginia has its own protocols for writing regulations, however, EPA needs assurances that these words cannot be construed in a manner different from that intended in the federal rule.

RESPONSE: § 5.21 of the Virginia Code Commission's form, style and procedure manual establishes the following rules for use of "shall," "may" and "must":

> Use "shall" in the imperative sense to express a duty or obligation to act. The term "shall" is generally used in connection with statutory mandates. "May" is permissive and generally expresses a right, privilege or power. When an individual is authorized but not ordered to act, the term "may" is appropriate. If an obligation to act is intended, "shall" is used. Use "may not" when a right, privilege or power is restricted. "Shall not" negates the obligation but not the permission to act; therefore, "may not" is the stronger prohibition. Wherever possible, the words "shall" or "may" are used in place of other terms such as "is authorized to," "is empowered to," "is directed to," "has the duty to," "must," and similar phrases. However, if certain action is intended to be a condition before accruing a right or privilege, the word "must" is used instead of "shall" or "may" (e.g., "In order to have your regulations published you must file them by the deadline."

In addition, the following guidance governs the regulations of the board:

> Whenever a State agency has the choice between the use of the words "will" or "shall" when applicable to its own actions in a regulation, the prudent choice is "will." "Shall" should be limited to requirements on the regulated community. The word "shall" when applied to the regulating government entity raises the opportunity for additional litigation in the nature of mandamus against the entity to enforce the self-imposed regulatory mandate, and creates potential problems when the entity's actions may differ somewhat in time or manner from what the regulation "requires."

Use of these terms in the proposal are consistent with state requirements without affecting the substance of the federal requirements.

No change has been made to the proposal as a result of this comment.

45. **SUBJECT:** Applicability (Article 8).

COMMENTER: U.S. EPA

TEXT: In 9 VAC 5-80-1605 C, the following statement is not technically correct: " …then the requirements of this **article** apply…". In the federal regulations only certain provisions apply in this instance.

RESPONSE: There are several places in the PSD regulations where EPA stipulates that paragraphs (j) through (r) [in one place it is paragraphs (j) through (s)] apply to major stationary sources and major modifications. While we understand that these paragraphs contain the core of the preconstruction review requirements and that the PSD regulations contain some requirements that do not apply to the sources, limiting applicability to those requirements dilutes the enforceability of other provisions such as stack heights, definitions, and possibly the new reform provisions. Also, provisions beyond those in the federal regulations have been added in order to meet state-specific needs, and we need to make sure that these can be enforced.

No change has been made to the proposal as a result of this comment.

46. **SUBJECT:** Applicability (Article 8).

COMMENTER: U.S. EPA

TEXT: In 9 VAC 5-80-1605 D, the addition of the "or modification" doesn't make sense – how can it apply to a modification of a major modification?

RESPONSE: This comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

47. **SUBJECT:** Applicability (Article 9).

COMMENTER: U.S. EPA

TEXT: We recommend that the text in 9 VAC 5-80-2000 C be revised to read: "The provisions of this article apply in (i) nonattainment areas designated in 9 VAC 5-20-204 or 40 CFR part 81, or …". This would allow nonattainment NSR to apply during the interim period between designation and the date the NSR SIP is due.

RESPONSE: Part 81 cannot be enforced by the state unless adopted by reference into the regulations of the board and updated as EPA makes changes. The process of adopting Part 81 and keeping references to it up to date would take as much time and as many resources that are now expended in maintaining and updating the Virginia list.

No change has been made to the proposal as a result of this comment.

48. **SUBJECT:** Definitions – general.

COMMENTER: U.S. EPA

TEXT: Although "unless otherwise required by context" in 9 VAC 5-80-1615 A and 9 VAC 5-89-2010 A is not new text, it is ambiguous and may imply director's discretion.

RESPONSE: Use of this expression is required by the Registrar of Regulations. It occurs in all Virginia regulations in order to provide clarity, not ambiguity. It allows for a reasonable interpretation of a term in the context of a specific regulation that may not be identical to the general terms found in 9 VAC 5 Chapter 10 that are intended to apply throughout the regulations. EPA has approved into the SIP many regulations containing this text on numerous occasions.

No change has been made to the proposal as a result of this comment.

49. **SUBJECT:** Definition of "allowable emissions" (Article 9).

COMMENTER: U.S. EPA

TEXT: Recommend changing to "is subject to federally enforceable or federally and state enforceable limits" in first sentence. Some limits will be only federally enforceable, such as new NSPS and MACT standards that have yet to be delegated. Subdivision (a) includes 40 CFR Part 63. Note that HAPs are not regulated NSR pollutants and this reference may be inappropriate unless DEQ intends to use this preconstruction permit program to implement the preconstruction requirements in 40 CFR 63.9.

RESPONSE: The current text ("subject to federally and state enforceable limits") is approved into Virginia's SIP. Virginia cannot recognize new NSPS and MACT standards until they have been adopted into the Virginia regulations. Additionally, Part 61, which applies to HAPs, is in the federal regulations; it is unclear why EPA includes Part 61 but not Part 63.

No change has been made to the proposal as a result of this comment.

50. **SUBJECT:** Definition of "applicable federal requirement" (Articles 8 and 9).

COMMENTER: U.S. EPA

TEXT: This term may be unnecessary. Nevertheless, the term as defined is not inclusive because it does not include the acid rain program. EPA recommends changing the text to state: "…includes, but is not limited to the following."

RESPONSE: This term is used throughout the rules in the context of ensuring that sources meet federal requirements beyond those of immediate concern to the NSR program. The recommended additional wording makes the text more accurate, and appropriate changes reflecting the intent of the comment have been made to the proposal.

51. **SUBJECT:** Definition of "best available control technology" (Article 9).

COMMENTER: U.S. EPA

TEXT: The definition includes 40 CFR Part 63 as one of the backstops for determining BACT. However, BACT applies only to "regulated NSR pollutants", which do not include HAPs, and it is inappropriate to include 40 CFR Part 63 as one of the considerations for BACT.

RESPONSE: As discussed in the response to comment 49, the equivalent federal language includes Part 61, which also governs HAPs. Using Parts 61 and 63 as a BACT floor is not the same as regulating HAPs within the rule. There are pollutants that fall into both categories of HAP and criteria.

No change has been made to the proposal as a result of this comment.

52. **SUBJECT:** Definition of “commence” (Article 8).

COMMENTER: U.S. EPA

TEXT: Although the rule text tracks the federal definition, EPA has had implementation issues with DEQ regarding the meaning of this provision. We would like to be clear “necessary preconstruction approvals **or permits**” only refers to those approvals **or permits** required under the NSR program. It does not mean permits that may be required by other environmental statutes, or other state or local municipal authorities.

RESPONSE: Yes, it applies only to NSR permits.

No change has been made to the proposal as a result of this comment.

53. **SUBJECT:** Definition of “emissions cap” (Articles 8 and 9).

COMMENTER: U.S. EPA

TEXT: EPA would be compelled to disapprove this term. The only cap recognized by EPA at this time is a PAL. Emission limits that cap emissions from a unit or a group of units could be construed to be “mini-PALs” that would allow changes to occur without review so long as the cap is not exceeded. EPA has not authorized this type of flexibility in the NSR program.

RESPONSE: This term is necessary in order to define the type of change being made. It is patterned after Title V, and is essential for administering the permit change provisions.

No change has been made to the proposal as a result of this comment.

54. **SUBJECT:** Definition of “enforceable as a practical matter” (Article 8).

COMMENTER: U.S. EPA

TEXT: EPA would not be able to include in the SIP revision the bolded text in subdivision (e) stating “...this article **and other regulations of the board**.” This would effectively be approval of other regulations not under review by EPA.

RESPONSE: This definition has been added because EPA uses the term without defining it, and some additional clarity was needed for the Virginia regulation. This term is essential for the state to be able to enforce any state-only provisions and other federal provisions (like NSPSs) that are not in the SIP that may be included in a permit. The main reason that the "enforceable as a practical matter" concept was introduced was to implement a court decision to require EPA to recognize "potential to emit" based on unapproved state regulations.

No change has been made to the proposal as a result of this comment.

55. **SUBJECT:** Definition of "federally enforceable" (Article 8).

COMMENTER: U.S. EPA

TEXT: (i) Delete the term "and citizens" from first paragraph. This makes the term more restrictive than the federal definition. (ii) There is no such thing as a federal operating permit or federal operating permit program in Virginia. (iii) The definition does not include minor NSR permits.

RESPONSE: (i) As discussed in the response to comment 56, this definition is patterned after the definition in 40 CFR 63.2. Additionally, Region III has previously stated that "The term 'federally enforceable' refers to EPA's **and citizens**' ability to enforce a provision under §§ 113/167 and 304 of the Clean Air Act." (ii) Virginia's federal operating permit program was approved by EPA on June 10, 1997 (62 FR 31516).
(iii) The definition does include minor NSR permits; see subdivision e. Virginia's minor NSR program has been approved into the SIP.

No change has been made to the proposal as a result of this comment.

56. **SUBJECT:** Definition of "federally enforceable" (Article 9).

COMMENTER: U.S. EPA

TEXT: The definition includes the phrase "enforceable by the administrator **and citizens**". The text in bold is not marked as new language being proposed with this rulemaking action. However, this text is not part of the currently approved SIP regulations. Nevertheless, EPA could not approve "and citizens" as part of the definition of federally enforceable because it is inaccurate and restricts the meaning of the term far beyond what was intended in the Clean Air Act. With respect to the text "or that are enforceable under other statutes administered by the administrator," EPA believes that it goes beyond the purpose served by the PSD program and is not necessary to be included in the definition. This text is also not part of the current SIP regulation.

RESPONSE: The current definition in the PSD regulation is outdated and inconsistent with other EPA policies and regulations. The definition in the Virginia proposal has therefore been updated to be more comprehensive. It is patterned after the definition in 40 CFR 63.2: "Federally enforceable means all limitations and conditions that are enforceable by the Administrator **and citizens** under the Act..."

Additionally, in a letter from Region III to the department (8/23/99), EPA addressed the issue of federal enforceability of Virginia's permit programs. EPA stated that the major NSR permit programs were federally enforceable. It also stated that "The term 'federally enforceable' refers to EPA's **and citizens**' ability to enforce a provision under §§ 113/167 and 304 of the Clean Air Act."

Part 63 is indeed a HAP program. However, the concept of enforceability of SIP permits should be universal across all programs. If a SIP permit is enforceable by citizens under § 112 programs, then it should also be enforceable by citizens under § 110.

No change has been made to the proposal as a result of this comment.

57. **SUBJECT:** Definition of "locality particularly affected" (Article 8).

COMMENTER: U.S. EPA

TEXT: It is not clear how this term is used. Recommend deleting.

RESPONSE: The term is established in § 10.1-1307.01 of the Virginia Air Pollution Control Law, and is used in the context of the promulgating regulations, granting variances, and issuing permits. It is used in Article 8 in the context of public participation. The specific term is necessary in this context in order to ensure that such a locality would receive proper notification.

No change has been made to the regulation as a result of this comment.

58. **SUBJECT:** Definition of "major modification" (Articles 8 and 9).

COMMENTER: U.S. EPA

TEXT: (i) In Article 9: subdivision 5(b) should be "under any permit issued under 40 CFR 52.21 or permit program approved under 40 CFR 51.166." (ii) Subdivision c (5)(c) 9 (in Article 8) and subdivision 5 (c) (in Article 9): This provision is not what was intended in the exclusion for alternative fuels and makes the it more stringent than the federal definition. It also seems to allow the use of trial burns without any limits on the duration or frequency of such tests.

RESPONSE: (i) "This chapter" is used because it conveys to the reader in a user-friendly way the rules approved under 40 CFR 51.166. (ii) According to 40 CFR 51.165(a)(1), states may use definitions that are more stringent. This particular provision is to comply with state law, and cannot be changed.

No change has been made to the proposal as a result of this comment.

59. **SUBJECT:** Definitions of "major new source review permit," "major new source review program," "minor new source review permit," "minor new source review permit program," "new source review permit," "new source review program" (Articles 8 and 9).

COMMENTER: U.S. EPA

TEXT: These definitions reference § 112 of the Clean Air Act. Does this mean

that DEQ intends to use this program to implement 40 CFR 63.9?

RESPONSE: These are generic definitions designed to encompass the NSR program as a whole. As indicated in the definitions, this includes Articles 8 or 9 of the NSR program. It is Article 7 that implements § 112(g). There is no intention of implementing 40 CFR 63.9 with Articles 8 or 9. In minor NSR, we do implement the HAPs preconstruction review program that has been delegated to the states through this program, as it is the only mechanism available to the state for making preconstruction approvals required under the HAPs program.

No change has been made to the proposal as a result of this comment.

60. **SUBJECT:** Definition of "net emissions increase" (Article 9).

COMMENTER: U.S. EPA

TEXT: Is the last sentence in subdivision (b) intended to implement the special provisions in the Clean Air Act for aggregating de minimis increases for applicability purposes? If so, EPA recommends that this provision be moved to the definition of major modification since it really an applicability requirement, not a netting issue. If this is not intended to implement the special provisions, this would appear to be acceptable.

RESPONSE: The special de minimis provisions are contained in 9 VAC 5-80-2130. This section has already been approved into the SIP and is not germane to this regulatory action. EPA has yet to promulgate its regulations on how states are to comply with the 1990 Clean Air Act Amendments. When EPA promulgates those regulations, this issue may be revisited.

No change has been made to the proposal as a result of this comment.

61. **SUBJECT:** Definition of "reasonable further progress" (Article 8).

COMMENTER: U.S. EPA

TEXT: EPA recommends deleting the definition for this term. In any case, we would be reluctant to include it in the SIP because it conflicts with the definition in § 171(1) of the Clean Air Act. Please note especially that reasonable further progress may not always require "substantial reductions in the early years," e.g., subpart I areas for the 8-hour ozone NAAQS.

RESPONSE: There is no readily apparent conflict with § 171(1). This provision is approved into the SIP, and is not germane to major NSR reform. As for the "substantial reductions in the early years," the definition basically includes but is not limited to, so the perceived conflict with 8-hour is unclear.

No change has been made to the proposal as a result of this comment.

62. **SUBJECT:** Definition of "significant" (Article 9)

COMMENTER: U.S. EPA

TEXT: The threshold for PM_{10} is missing. How is DEQ implementing NSR for $PM_{2.5}$? Does subdivision (b) apply to subpart I ozone nonattainment areas? If not, it would be advisable to add appropriate provisions since NSR currently applies in those areas.

RESPONSE: There is no threshold for PM_{10} in the Virginia regulations because there is no threshold for PM_{10} in the corresponding federal regulations. Virginia has never had any PM_{10} nonattainment areas, so this is not an issue. With respect to $PM_{2.5}$, other provisions have been adopted, such as inclusion of the localities on the list of nonattainment areas and the offset requirements, but without the significance level absent any EPA guidance. However, the proposal has been revised to include the threshold in EPA's recent $PM_{2.5}$ proposal in hope that when EPA promulgates the final regulations that there will be no change. Subdivision (b) does apply to subpart I areas—this is why there is a subdivision (a) for serious and severe areas.

63. **SUBJECT:** Definition of "state operating permit program" (Articles 8 and 9).

COMMENTER: U.S. EPA

TEXT: Recommend adding a subdivision stating that it is also a means of creating state-only requirements. If you read the definition literally, the three subdivisions are all inherently "and," meaning that all are true at all times, which may not be your intent.

RESPONSE: Although the program may be used for other purposes such as state-only requirements, there is no need to add this statement for purposes of inclusion in federal requirements.

No change has been made to the proposal as a result of this comment.

64. **SUBJECT:** Incorporation of multiple permits (Article 8).

COMMENTER: U.S. EPA

TEXT: The interaction between state operating permits, NSR permits and title V in 9 VAC 5-80-1625 E and F is confusing. Does the NSR permit also authorize indefinite operation after the initial startup and shakedown or is the source compelled to get a state operating permit in order to operate after initial startup and shakedown? Regardless of how this question is answered the source will be obligated to apply for or modify its Title V permit. Is the NSR permit required to contain all applicable requirements – not just those related to NSR? Is the intent of 9 VAC 5-80-1625 E to be able to incorporate provisions (and even change those provisions) from previously issued major and minor NSR permits? Otherwise, at its worst, the provision would seem to be saying that multiple units can have

different permits, regardless of whether they would constructed under one project and it is the discretion of the board to combine them into one permit. EPA assumes that state operating permit does not include title V.

RESPONSE: As discussed in the responses to comments 70 and 71, the proposal has been revised in order to eliminate the combining of permits, except at the time of initial application and processing.

65. **SUBJECT:** Performance standards (Article 8).

COMMENTER: U.S. EPA

TEXT: 9 VAC 5-80-1665 references 9 VAC 5-50-20 and 30, which establish requirements for all different types of "performance standards," including NSPS standards and provisions for testing that already exist in the approved SIP. EPA needs assurance that this provision does not allow for "director's discretion" with respect to standards and testing procedures already established by a federal rule or a federally approved rule that would otherwise require EPA approval in order to change.

RESPONSE: As discussed in the response to comment 75, "standards of performance" is a generic term that applies to Chapter 50, which applies to all new and modified stationary sources. This includes Part I (special provisions, including 5-50-30 and 5-50-30), Article 4 (BACT and LAER) and Article 5 (NSPSs). Article 5 is not in the SIP, but Part I and Article 4 are. However, if a permit is issued under Chapter 80, they must comply with the NSPS if we determine that the NSPS is BACT or LAER. In this case, compliance with the NSPS then becomes federally enforceable via its inclusion in the Chapter 80 permit.

No change has been made to the proposal as a result of this comment.

66. **SUBJECT:** Compensating emission reductions (Article 8).

COMMENTER: U.S. EPA

TEXT: Regarding 9 VAC 5-80-1715 B 2: if modeling indicates that the new source or modification (as opposed to an existing source) is **causing** a violation of an ambient standard, the rule must specify that the source may not construct until emission reductions sufficient to eliminate the violation are achieved.

RESPONSE: This text is copied from 40 CFR 51.165(b)(2), (3), and (4).

No change has been made to the proposal as a result of this comment.

67. **SUBJECT:** Appendix W to 40 CFR Part 51 (Article 8).

COMMENTER: U.S. EPA

TEXT: In 9 VAC 5-80-1725 A, there is no date associated with the version of Appendix W to 40 CFR Part 51 that would apply. By default, would this mean the version that existed when the rule was finalized (since this provision is not being changed it is confusing what that would mean) or can is be presumed to always be the most recent version in the CFR?

RESPONSE: Appendix W to 40 CFR Part 51 is incorporated by reference into the Virginia regulations at 9 VAC 5-20-21 E 1 a (2). Applicability of the provision is not legal unless this action is accomplished; this is reflected in 9 VAC 5-80-1605 K (old L). It is updated frequently as needed to reflect the most recent version. This language is not being revised with this action, and has already been approved into the SIP.

No change has been made to the proposal as a result of this comment.

68. **SUBJECT:** Source information (Article 8).

COMMENTER: U.S. EPA

TEXT: In 9 VAC 5-80-1745 A, the references to 9 VAC 5-80-1705, 1715, 1735 and 1755 should be deleted because the analogous federal rule applies generally. See 40 CFR 51.166(n) where it uses the "section." It is interesting to note that while the federal regulations require modeling, impact analyses, etc., these are not necessarily required to be submitted to the reviewing authority.

RESPONSE: These referenced sections are the required information and have been added to assist users in finding what the required information is.

No change has been made to the proposal as a result of this comment.

69. **SUBJECT:** General need to obtain a permit (Article 9).

COMMENTER: U.S. EPA

TEXT: : The last sentence in 9 VAC 5-80-2020 A uses the phrase "all the applicable requirements of this article." There is a definition of "federal applicable requirements." If the latter term is not used in this rule we recommend removing that definition so that there is no confusion with the text in 9 VAC 5-80-2020 A, which is obviously very different from federal applicable requirement.

RESPONSE: The difference between "all applicable requirements" and "federal applicable requirements" seems obvious. Because a definition for federally applicable requirements is included, a reasonable person should be able to distinguish between federal requirements in general and requirements specific to this article.

No change has been made to the proposal as a result of this comment.

70. **SUBJECT:** Combining permit applications (Article 9).

COMMENTER: U.S. EPA

TEXT: From an implementation and Title V standpoint, there are difficulties with 9 VAC 5-80-2020 D. Please clarify how the following situation would work: In XX year, a facility obtains a NSR permit to construct two new printing presses, press A and press B. After 5 years, the facility wants to modify press A to increase its capacity, resulting in a significant net emissions increase so the facility applies for a new permit for press A. Will the new permit that is issued address only the modification to press A and will the new permit supersede the requirements for press A in the original NSR permit?

RESPONSE: Virginia's NSR program consists of several regulations: two for major NSR, one for minor NSR, and one for major HAPs. It is possible that an individual source could simultaneously need permits for the purposes of PSD, minor NSR, and HAPs. In the interest of efficiency, this provision was created to allow owners to have a single application for these permits, and to allow the agency to issue a single permit. Either scenario mentioned could be accomplished under this provision: we could either issue a new permit, or amend a permit to reflect the modification. However, in order to address the commenter's concerns, the proposal has been revised to eliminate permit combining, except at the time of initial application and processing.

71. **SUBJECT:** Interaction between NSR and operating permits (Article 9).

COMMENTER: U.S. EPA

TEXT: The interaction between NSR and operating permits in 9 VAC 5-80-2020 E is a reversal of how most states handle these permits. An NSR permit normally covers a "project," not an entire facility. Furthermore, states usually issue a permit to construct that covers only the period from construction to startup and shakedown. Then the facility is required to apply for a permit to operate, the latter being a permit that regulates the entire facility. The NSR permit conditions are then incorporated into the operating permit. This allows modifications to provisions such as monitoring, testing and recordkeeping to occur within the context of a state operating permit – a much better vehicle since they usually have administrative procedures for modifying the permit – unlike NSR permits. Neither EPA's or the state's rules have any provisions for modifying NSR permits.

RESPONSE: The Virginia state operating permit does not operate like other state operating permits. The Virginia SOP is a source-specific regulatory mechanism, not an operating permit in the sense that Title V is an operating permit. There are provisions for modifications (amendments) in all of the permitting rules. However, in order to address the commenter's concerns, the proposal has been revised to eliminate combining of permits.

72. **SUBJECT:** Combining permit applications (Article 9).

COMMENTER: U.S. EPA

TEXT: 9 VAC 5-80-2030 A is confusing. Wouldn't a source be circumventing NSR if they submitted multiple applications for emissions units that are part of the same project?

RESPONSE: No problems with this provision have ever been identified. It is designed to encourage efficiency by encouraging sources to submit an all-inclusive application for all affected units.

No change has been made to the proposal as a result of this comment.

73. **SUBJECT:** Application information required (Article 9).

COMMENTER: U.S. EPA

TEXT: Although this is not required, in 9 VAC 5-80-2040 B, EPA recommends that either the application requirements in the rules or, at a minimum, the application forms address the calculations and justifications needed to do the future actual projected emissions and exclusion for demand growth.

RESPONSE: When EPA came out with the major NSR reform regulations for PSD, it did not include any such requirement in 40 CFR 51.166(n).

No change has been made to the proposal as a result of this comment.

74. **SUBJECT:** Emission caps (Article 9).

COMMENTER: U.S. EPA

TEXT: EPA has a concern with 9 VAC 5-80-2050 B, specifically the reference to "emission caps". Other than PALs, EPA does not recognize emission caps as being any different than any other limitation. In other words, if there is a "cap" on one or several units, this in no way allows a facility to make pre-authorized changes so long as the cap is not violated. This can only be accomplished through a PAL. EPA will need to have further clarification on Virginia's use of the term "cap" before any provisions regarding caps can be approved as part of the SIP.

RESPONSE: This comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

75. **SUBJECT:** Standards of performance (Article 9).

COMMENTER: U.S. EPA

TEXT: In 9 VAC 5-80-2080, use of the term "standards of performance" and

references to 5-50-30 are confusing and possibly incorrect. Please clarify whether "standards of performance" refers to EPA's NSPS standards or whether it is a more generic term that can apply to any emission standard. Are standards different from permit limits in that they must be established by rule? Please note that 5-80-2080 refers to 5-50-30 and 5-50-30 specifically refers to compliance with 5-50-410, which incorporates by reference the federal NSPS standards. It would be inappropriate and inadvisable to include any compliance provisions for NSPS in the SIP, particularly when the State's regulations under 2080 would allow for the use of alternative tests, or waivers of testing for which EPA has not delegated such authority. Note also that the current SIP contains similar language. If "standards of performance" does include or can include NSPS standards, this section have been mistakenly included in the SIP.

RESPONSE: "Standards of performance" is a generic term that applies to Chapter 50, which applies to all new and modified stationary sources. This includes Part I (special provisions, including 5-50-30 and 5-50-30), Article 4 (BACT and LAER) and Article 5 (NSPSs). Article 5 is not in the SIP, but Part I and Article 4 are. However, if a permit is issued under Chapter 80, they must comply with the NSPS if we determine that the NSPS is BACT or LAER. In this case, compliance with the NSPS then becomes federally enforceable via its inclusion in the Chapter 80 permit.

No change has been made to the proposal as a result of this comment.

76. **SUBJECT:** Offsets (Article 9).

COMMENTER: U.S. EPA

TEXT: 9 VAC 5-80-2120 H is not consistent with 40 CFR 51.165(a)(3)((ii)(C)(*1*). However, EPA has proposed changing the requirements for offsets generated by shut down credits and these changes will be reflected in the phase II ozone implementation rule. In general, the state must require that the emissions be included in the inventory for reasonable further progress and the attainment demonstration, including those sources that were shutdown prior to the base year inventory (e.g., credits generated prior to 2002 for the 8-hour ozone standard).

RESPONSE: This provision is indeed consistent with 40 CFR 51.165—the federal rule says "date specified for this purpose in the plan," which has been provided as indicated in this provision. It is also approved in the SIP. Once EPA issues its Phase II guidance, the regulations may be revised as needed.

No change has been made to the proposal as a result of this comment.

77. **SUBJECT:** Appendix S to 40 CFR 51 (Article 9).

COMMENTER: U.S. EPA

TEXT: Please clarify the scope of 9 VAC 5-80-2120 J. The provision uses the

term “article,” implying that this provision applies throughout the NSR rule, not just provisions related to offsets. Is this correct?

RESPONSE: This comment is acceptable and appropriate changes reflecting the intent of the comment have been made to the proposal.

78. **SUBJECT:** PAL renewal (Article 9).

COMMENTER: U.S. EPA

TEXT: 9 VAC 5-80-2144 J 2 includes the phrase “or until the board determines that the revised permit with the renewed PAL will not be issued.” Assuming the source submitted a timely renewal application and the board denies the renewal, what requirements would the source be obligated to comply with after the permit expires? The plain text of the last sentence would appear to preclude continuing the effective date of the PAL until a new permit is issued. What procedures would the source have to follow (including timeliness) for submitting a second application (since the renewal application was denied)?

RESPONSE: See 9 VAC 5-80-2144 I, which covers PALs that are not renewed. A reference to 9 VAC 5-80-2144 I has been added to 9 VAC 5-80-2144 J 2, which should clarify the situation.

79. **SUBJECT:** Recordkeeping (Article 9).

COMMENTER: U.S. EPA

TEXT: The recordkeeping requirement in 9 VAC 5-80-2144 N 1 goes beyond the federal requirements and needs to be included in any demonstration that these proposed rules are equivalent to the federal rules for PALs.

RESPONSE: This provision is identical to that in 40 CFR 51.165(f)(13)(i).

No change has been made to the proposal as a result of this comment.

80. **SUBJECT:** Repeal of 9 VAC 5-80-2160 (Article 9).

COMMENTER: U.S. EPA

TEXT: The proposed rules have repealed 9 VAC 5-80-2160 but this section remains in the SIP. The SIP revision needs to include a request to rescind this portion of the approved SIP.

RESPONSE: This section is still in the SIP because EPA has yet to process Revision D00, which was submitted December 16, 2003.

No change has been made to the proposal as a result of this comment.

81. **SUBJECT:** Changes to permits (Article 9).

COMMENTER: U.S. EPA

TEXT: 9 VAC 5-80-2200 through 2240 are new revisions relative to the SIP. These sections establish procedures for making revisions to the "permit." However, these provisions are not consistent with either the Clean Air Act or EPA's implementing regulations for NSR. Conceptually, a permit to construct is required whenever a new source is constructed or an existing source is modified. The permit to construct must contain all requirements necessary to ensure that air quality is protected for that particular project, i.e., for that new source or modification. If a source is added, or an existing unit is modified again, it needs a new NSR permit to construct. However, it appears that these sections are intended to have the NSR permit be a de facto operating permit. If a facility wants to make a physical change or a change in the method of operation does it apply for a modification of an existing NSR permit or does it apply for a new NSR permit? If a PSD permit can be modified to account for a "change", what changes, outside of NSR related changes, are anticipated by these sections? It is important to point out that with the addition of these provisions, Virginia now has six different permit programs: Title V (Articles 1, 2, 3 and 4), State Operating Permits (Article 5), Permits for New and Modified Stationary Sources (Article 6), Permits for New and Reconstruction Major Sources of HAPs (Article 7), Permits for Major Stationary Sources and Modifications – PSD Areas (Article 8), and Permits for Major Stationary Sources and Modifications – Nonattainment Areas. Each of these has its own administrative procedures for permit modifications, permit consolidation, etc. How does a facility really know if it needs to modify an existing permit in order to make a change, and if so, which one. Or does a facility have to apply for a new permit for the modification plus all of the other existing activities at a source? Since these questions are not readily answered by the plain text of the regulations, EPA will need a lot of clarification as to (1) what types of changes require a new permit versus a modification of an existing permit; (2) what safeguards are in place to assure that facilities know when they need to perform an NSR applicability determination and when a permit application for a new project is required.

RESPONSE: Provisions have been added that would ensure that permit change provisions are not used to address situations that would require a new permit.

82. **SUBJECT:** Clarifications/correction of typographical errors.

COMMENTER: U.S. EPA

TEXT: Article 9: Definition of "actual emissions" should read "through c" and not "d." Definition of "regulated NSR pollutant" refers to "1 and 2" but should read "a and b." 9 VAC 5-80-2020 B and C appear to be redundant.

RESPONSE: These comments are acceptable and appropriate changes

reflecting the intent of the comment have been made to the proposal.

TEMPLATES\FINAL\FR04
REG\DEV\E0312ST